90-360

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC.,

Petitioner,

v.

PUBLIC CITIZEN, NUCLEAR ENERGY INFORMATION SERVICE, CENTER FOR NUCLEAR RESPONSIBILITY, DEL-AWARE UNLIMITED, INC., THREE MILE ISLAND ALERT, COALITION FOR THE ENVIRONMENT, AND CUYAHOGA COUNTY CONCERNED CITIZENS,

Respondents,

AND

UNITED STATES NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 306 of the Nuclear Waste Policy Act of 1982 ("Section 306"), 42 U.S.C. § 10226, directs the Nuclear Regulatory Commission (the "NRC") "to promulgate regulations, or other appropriate Commission regulatory guidance," governing the training and qualifications of nuclear power plant operating personnel. The questions in this case are:

1. Whether the NRC's choice of a policy statement, instead of prescriptive regulations, as the best means of promoting nuclear safety is a permissible implementation of Section 306.

2. Whether, as a consequence of what the court of appeals termed the "everpresent duty" of agencies to ensure the lawfulness of their actions, minor amendments to a longstanding agency rule permit challenges to the substance of the underlying rule that otherwise would be time-barred.

PARTIES TO THE PROCEEDING

Petitioner, intervenor below, is the Nuclear Management and Resources Council, Inc. ("NUMARC"), a nonprofit membership corporation incorporated under the laws of Delaware, with no parent or subsidiaries. All utilities holding operating licenses or construction permits for commercial nuclear power plants are members of NUMARC. NUMARC is responsible for coordinating the efforts of its members, as well as those of other nuclear industry organizations, in matters involving generic regulatory policy issues and regulatory aspects of operational and technical safety issues.

Respondents, who were petitioners below, are Public Citizen, the Nuclear Energy Information Service, the Center for Nuclear Responsibility, Del-Aware Unlimited, Inc., Three Mile Island Alert, the Coalition for the Environment, and Cuyahoga County Concerned Citizens.

Respondents, who were respondents below, are the United States Nuclear Regulatory Commission and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Nuclear Management and Resources Council, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 901 F.2d 147 and is set forth in the Appendix ("App.") hereto. *See* App. at 1a-23a. The orders denying timely filed petitions for rehearing and suggestions for rehearing *en banc,* which have not been reported, also are set forth in the Appendix hereto. *See* App. at 24a, 25a-26a.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1990. Timely filed petitions for rehearing and suggestions for rehearing *en banc* were denied on June 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 306 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. § 10226, provides:

> The Nuclear Regulatory Commission is authorized and directed to promulgate regulations, or other appropriate Commission regulatory guidance, for the training and qualifications of civilian nuclear powerplant operators, supervisors, technicians and other appropriate operating personnel. Such regulations or guidance shall establish simulator training requirements for applicants for civilian nuclear powerplant operator licenses and for operator requalification programs; requirements governing NRC administration of requalification examinations; requirements for operating tests at civilian nuclear powerplant simulators, and instructional requirements for civilian nuclear powerplant licensee personnel training programs. Such regulations or other regulatory guidance shall be promulgated by the Commission within the 12-month period following

January 7, 1983, and the Commission within the 12-month period following January 7, 1983, shall submit a report to Congress setting forth the actions the Commission has taken with respect to fulfilling its obligations under this section.

The United States Nuclear Regulatory Commission's 1985 "Policy Statement on Training and Qualification of Nuclear Power Plant Personnel" implementing Section 306, 50 Fed. Reg. 11,147 (1985), and the 1988 Amendments thereto, 53 Fed. Reg. 46,603 (1988), are set forth in the Appendix hereto. *See* App. at 27a-34a, 35a-39a.

STATEMENT OF THE CASE

Petitioner, Nuclear Management and Resources Council, Inc. ("NUMARC"), asks this Court to review a construction of section 306 of the Nuclear Waste Policy Act of 1982 (the "Act" or "Section 306"), 42 U.S.C. § 10226, by a three-judge panel of the Court of Appeals for the District of Columbia Circuit that will require a complete reversal in the underlying philosophy and direction of both government and industry approaches to nuclear power plant personnel training programs – a reversal of current practice that puts at risk programs that promote public health and safety. More particularly, the decision below threatens to destroy a national, industry-developed training program, relied upon by all concerned utilities, which has been approved by the United States Nuclear Regulatory Commission (the "NRC" or the "Commission") as the preferred means of achieving nuclear safety. The training program, which grew out of the recommendations of a Presidential commission, has been successfully implemented at massive cost for over five years. The background of this controversy follows:

1. In 1979, an accident at the Three Mile Island Nuclear Station in Pennsylvania focused national attention upon the issue of nuclear safety. A Presidential commission appointed to investigate the accident subsequently concluded, *inter alia,* that inadequate training of employees at nuclear power plants contributed significantly to the risk of a future mishap. *See* Kemeny Commission, Report of the President's Commission on the Accident at Three Mile Island at 10 (1979) (the "Report"). The Kemeny Commission recommended that accredited training institutions be established, that individual utilities be held responsible for training personnel in the specifics of operating their particular plants and that comprehensive on-going training be provided that continually integrates operating experience.[1] *Id.* at 70.

The Kemeny Commission further identified the existing "preoccupation with regulations" as a fundamental flaw in the nuclear power safety program. *Id.* at 9. "[W]e are convinced," it stated, that "regulations alone cannot assure safety. Indeed, once regulations become as voluminous and complex as those regulations now in place, they can serve as a negative factor in nuclear safety. . . .[because the] satisfaction of regulatory requirements is equated with safety." *Id.* To address this deficiency, the Kemeny Commission, while urging the NRC to prescribe strict standards, specifically concluded that

> merely meeting the requirements of a government regulation does not guarantee safety. Therefore, the industry must also set and police its own standards of excellence . . . . The industry should establish a program that specifies appropriate safety standards including those for management, quality assurance,

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1. The Kemeny Commission criticized the NRC's then current role in training because, by equating passing an NRC examination with satisfactory performance, the "NRC may be perpetuating a level of mediocrity." Report at 23.

> and operating procedures and practices, and that conducts independent evaluations. The recently created Institute of Nuclear Power Operations, or some similar organization, may be an appropriate vehicle for establishing and implementing this program.

Id. at 68.

The Three Mile Island accident and the findings of the Kemeny Commission were, in fact, the catalyst for far-reaching changes in the nation's nuclear regulatory program and in nuclear industry safety practices. A principal response of the industry was the formation in 1979 of an independent organization, the Institute of Nuclear Power Operations ("INPO"), to facilitate and foster industry self-improvement as well as to promote the highest levels of safety and reliability in the operation of nuclear power plants. With specific reference to operating personnel, INPO developed training and qualification guidelines covering critical job categories in nuclear power plants, including the reactor operators specifically licensed by the Commission under 10 C.F.R. Part 55. By 1985, under INPO sponsorship, a comprehensive personnel training accreditation program had been established for the nuclear utility industry that the NRC found to encompass those "elements of effective performance-based training" which it deemed "essential to acceptable training programs." 50 Fed. Reg. 11,147, 11,148 (1985), App. at 30a.[2]

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2. To obtain accreditation under the INPO-managed training accreditation program endorsed by the NRC, a utility must first develop a comprehensive training program. Then, the utility prepares and submits to INPO a detailed written evaluation of its training program, employing INPO-established criteria. Next, after reviewing the utility's self-evaluation, an INPO accreditation team visits and evaluates the utility's plant and training site or sites and assesses the effectiveness of the utility's program. The final step in the accreditation process is the rendering of an accreditation

Congress responded to the Kemeny Commission's criticisms regarding the training of nuclear power plant personnel by including among the otherwise unrelated provisions of the 1982 Nuclear Waste Policy Act a new Section 306, which directs the NRC "to promulgate regulations, *or other appropriate Commission regulatory guidance,* for the training and qualifications of civilian nuclear powerplant operators, supervisors, technicians and other appropriate operating personnel." 42 U.S.C. § 10226 (emphasis added). Section 306 further provides that "[s]uch regulations or guidance" shall establish various instructional, testing and administrative "requirements." *Id.* A late addition to the Nuclear Waste Policy Act, Section 306 was not the subject of any Congressional committee report.

On March 20, 1985, after extensive public meetings about the subject, the NRC promulgated a "Commission Policy Statement on Training and Qualification of Nuclear Power Plant Personnel" (the "Policy Statement") to implement Section 306. *See* 50 Fed. Reg. 11,147 (1985), App. at 27a-34a. Rejecting NRC staff suggestions that it issue prescriptive regulations with regard to personnel training programs, the Commission declared the Policy Statement to be fully "responsive to the mandate of the

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FOOTNOTE—*(Continued)*
decision by a panel of the independent National Nuclear Accrediting Board, the members of which include prominent individuals representing non-nuclear industrial training organizations, individuals from the post-secondary education community, individuals recommended by the NRC, and individuals representing nuclear utilities. (Individuals representing nuclear utilities must constitute less than a majority of any Accrediting Board panel.) If accreditation is awarded, it remains effective for four years; however, the utility is required, after two years, to submit to the Accrediting Board for approval a report discussing any changes in the accredited training programs since the last accreditation review. *See* Supplemental Appendix at 7-12, *Public Citizen v. NRC,* 901 F.2d 147 (D.C. Cir. 1990) (No. 89-1017).

Nuclear Waste Policy Act for regulatory guidance . . . ." 50 Fed. Reg. at 11,147, App. at 28a.[3]

The Policy Statement expressly recognized that the nuclear power industry, principally through actions initiated by INPO, had made and was making substantial progress in "developing programs to improve nuclear utility training and personnel qualification." 50 Fed. Reg. at 11,148, App. at 29a. Rather than undercut an existing and effective voluntary effort, the Commission made the INPO-managed training accreditation program the focus of the Policy Statement. *See id.* The Policy Statement also declared, however, that the NRC would pursue this course only as long as the industry programs produced the desired results and that the Commission had a "continuing responsibility . . . to evaluate the possible need for further NRC action based on the success of industry programs after a two-year period," which responsibility it intended to carry out through a comprehensive, twelve-point oversight program. 50 Fed. Reg. at 11,148, App. at 29a, 30a-32a.

2. On April 15, 1986, more than a year after the Policy Statement was published, respondent Public Citizen requested the NRC to undertake a rulemaking procedure for the claimed purpose of implementing Section 306. In November 1986, while that petition still was pending, Public Citizen and a coalition of other organizations filed a suit in the United States District Court for the District of Columbia, later transferred to the Court of Appeals for the District of Columbia Circuit, challenging the Commission's implementation of Section 306 through promulgation of the Policy Statement.

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3. The Commission opted to implement some aspects of Section 306 by regulation. In 1987, for example, it revised its regulations governing operator licensing to provide specifically for operator training programs, including simulator training and requalification training and examinations. *See* Brief for Respondents at 10, *Public Citizen v. NRC*, 901 F.2d 147 (D.C. Cir. 1990) (No. 89-1017) (citing revisions to 10 C.F.R. Part 55).

See Public Citizen v. NRC, 845 F.2d 1105 (D.C. Cir. 1988) (*"Public Citizen I"*). Public Citizen there contended that the Act required the Commission to promulgate "binding regulations" for the training and qualifications of nuclear power plant personnel. *Id.* at 1106. NUMARC was granted leave to intervene in the proceedings.

The Commission denied Public Citizen's rulemaking petition in January 1987 (*see* 52 Fed. Reg. 3121 (1987)), and Public Citizen did not seek direct court review of that denial. Sixteen months later, the court of appeals in *Public Citizen I* concluded that the Policy Statement constituted final agency action implementing Section 306 and, accordingly, that Public Citizen's lawsuit was time-barred. Specifically, the court dismissed the case for lack of jurisdiction because Public Citizen had failed to meet either the 60-day deadline for seeking review of a final agency action under the Hobbs Act, 28 U.S.C. § 2344, or the 180-day deadline for seeking review of a final NRC decision under the Nuclear Waste Policy Act, 42 U.S.C. § 10139(c). *See* 845 F.2d at 1107-08. The court further observed that the suit had been filed too early to be a petition for review of the denial of Public Citizen's 1986 request for rulemaking. *See id.* at 1108-10.

The nation's nuclear power utilities, acting in reliance upon the Policy Statement and the court of appeals' rejection of Public Citizen's legal challenge, continued at a cost amounting to hundreds of millions of dollars to expand and refine the INPO-managed training and accreditation program. *See infra* n.6. The Commission, in turn, continued carefully to monitor the industry program. In May 1987, after two years of experience, the NRC staff evaluated the results of the industry's program and "the possible need for further NRC action," as contemplated by the Policy Statement. *See* 50 Fed. Reg. at 11,148, App. at 29a. Based upon that evaluation, the Commission subsequently concluded that "the program

is effective in ensuring that personnel have qualifications commensurate with the performance requirements of their jobs." *See* 53 Fed. Reg. 46,603, 46,604 (1988), App. at 38a. The NRC staff also recommended that the Commission continue to "endorse the industry accreditation program and defer rulemaking." SECY-87-121 (May 11, 1987). The NRC, without issuing a formal decision, agreed on July 7, 1987 to accept this recommendation and thus maintain the regulatory status quo. *See* SECY-88-281 (Sept. 30, 1988).

Over a year later, on November 18, 1988, the NRC published in the *Federal Register* three minor amendments to the Policy Statement (the "Amendments"). *See* 53 Fed. Reg. 46,603 (1988), App. at 35a-39a. In promulgating the Amendments, the Commission confirmed that the NRC staff had "evaluated the results of the INPO accreditation program between March 1985 and March 1987" and that, on the basis of this study, the Commission had determined that only three narrow amendments to the Policy Statement were appropriate. *See* 53 Fed. Reg. at 46,604, App. at 36a-39a.[4] Significantly, the Policy Statement was not republished, nor did the 1988 Amendments make any more permanent the NRC regulatory guidance expressed in the 1985 Policy Statement or address the Commission's 1985 decision that the Policy Statement complied fully with the mandate of Section 306.

3. On January 13, 1989, Public Citizen and a coalition of other organizations, many of which had

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4. The Amendments explicitly limited NRC action regarding the Policy Statement to: (1) recognizing that the INPO-managed accreditation program had added an additional training program since the Policy Statement was issued; (2) expanding the NRC staff's monitoring of the INPO-managed training accreditation program by performing post-accreditation reviews at selected sites; and (3) bringing the Policy Statement's enforcement provisions into full conformity with the NRC's general enforcement practices. *See* 53 Fed. Reg. at 46,604, App. at 39a.

joined Public Citizen in its earlier, unsuccessful petition for judicial review, filed with the United States Court of Appeals for the District of Columbia Circuit a petition seeking judicial review, pursuant to 28 U.S.C. § 2342(4) and 42 U.S.C. § 10139, of the NRC's November 1988 pronouncement. Rather than mount a challenge to the substance of the 1988 Amendments, however, Public Citizen sought judicial review solely in order to renew its attack on the NRC's 1985 decision to implement Section 306 by means of the Policy Statement. As in *Public Citizen I,* Public Citizen contended that the Act directs the NRC to issue "enforceable requirements" for the training and qualifications of nuclear power plant personnel. *See* Petitioners' Statement of Issue, *Public Citizen v. NRC,* 901 F.2d 147 (D.C. Cir. 1990) (No. 89-1017). NUMARC was again granted leave to intervene in the proceedings.

This time, the court of appeals invalidated the NRC's implementation of Section 306. *See Public Citizen v. NRC,* 901 F.2d 147 (D.C. Cir. 1990) *("Public Citizen II"),* App. at 1a-23a. The court first held that Public Citizen's second petition for judicial review, although filed nearly four years after promulgation of the Policy Statement, was timely because of the Commission's 1988 issuance of what the court conceded were "minor" and "noncontroversial" Amendments. 901 F.2d at 149, 150, App. at 4a, 5a. In so ruling, the court concluded that the Amendments "necessarily raise[d]" the lawfulness of the Commission's 1985 decision to implement Section 306 by means of a policy statement, and thus started anew the running of the applicable statutory review periods. *See* 901 F.2d at 150-52, App. 5a-9a. The court further observed that, even if Public Citizen's 1989 petition for judicial review of the 1985 Policy Statement were untimely, the court was justified on grounds of judicial economy in reaching the merits because Public Citizen assertedly could obtain that review merely by filing with the NRC a petition for

rulemaking to implement Section 306 and then judicially challenging a denial of that petition. *See* 901 F.2d at 152-53, App. at 9a-11a.

In its ruling on the merits, the *Public Citizen II* court held that the Policy Statement did not comply with Section 306's directive that the NRC "promulgate regulations, or other appropriate Commission regulatory guidance, . . . establish[ing] instructional requirements for civilian nuclear power plant licensee personnel training programs." 42 U.S.C. § 10226; *see* 901 F.2d at 153-58, App. at 12a-22a. Although it conceded that, "in ordinary parlance," to give " 'guidance' certainly can mean . . . to give advice or suggestions," the court nonetheless found the term "regulatory guidance" to be ambiguous. The court then focused on the language of Section 306 directing the Commission to "establish . . . instructional requirements" and reasoned that, since "requirements" presumably can be established only by enforceable regulations, the words "regulatory guidance" (though consistently distinguished from "regulations" in the Act) plainly must mean "some form of mandatory instruction." 901 F.2d at 156, App. at 19a. Because the NRC's 1985 Policy Statement, by definition, is not a binding regulation, the court struck it down.

The court of appeals on June 15, 1990 denied timely petitions for rehearing and suggestions for rehearing *en banc* filed by NUMARC and the NRC. *See* App. at 24a, 25a-26a. In a separate Statement, Judge Williams, the author of *Public Citizen I,* joined by Judges Silberman, D.H. Ginsburg, and Sentelle, although concurring in the denial of the suggestions for rehearing *en banc,* pointedly disagreed with the *Public Citizen II* panel's decision on the merits, stating that the panel's construction of the Act means that Section 306 is "completely shorn of the [disjunctive statutory] language." App. at 26a.

REASONS FOR GRANTING THE WRIT

This case presents an issue of fundamental importance to the safety of operations in the nuclear power industry. In the decade since the Three Mile Island accident, the training and qualifications of the nation's nuclear power plant personnel and the resulting operational benefits have been grounded on a single principle: that safety is better assured by encouraging industry professionalism and self-improvement than by mandating compliance with particular regulatory prescriptions. The decision below rejects this principle.

That decision will have the most serious consequences. This is not a case, as Public Citizen suggested below, in which an industry is simply attempting to evade wholesome regulations.[5] To the contrary, the regulatory regime that would be displaced by the court of appeals' holding implements a philosophy that was proposed by the independent Kemeny Commission and endorsed by the NRC, both of which concluded that nuclear safety could best be assured by a system that emphasizes industry initiative while maintaining close NRC oversight. The reason for this approach is manifest. In an area as complex and variable as the operation of nuclear facilities, prescriptive regulations inevitably set static standards of adequate performance, and no more; such a system may perpetuate regulatory dependency and thus, as the Kemeny Report noted, "serve as a negative factor in nuclear safety." Report at 9. Uniform adherence to the highest safety standards, on the other hand, must involve the industry in "set[ting] and polic[ing] its own standards of excellence." *Id.* at 68; *see* 50

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5. In fact, all utilities holding operating licenses or construction permits for nuclear power plants participate in the INPO-managed training accreditation program. There has been no suggestion during the course of this litigation that the INPO program is ineffective – or, for that matter, that the regulatory scheme sought by Public Citizen would be more effective.

Fed. Reg. at 11,148, App. at 29a-31a. Indeed, to achieve this goal, the industry has invested hundreds of millions of dollars and many thousands of man hours in the development of training and accreditation programs[6] — an expenditure of technical and monetary resources premised in large part on the seeming finality of the Commission's conclusion more than five years ago that industry "initiative and . . . further self-improvement" (50 Fed. Reg. at 11,148, App. at 29a), if effective, would be the centerpiece for improving the safety of operations in the nation's nuclear power plants.

The decision below rendered this enterprise nugatory while mandating a departure from the prevailing regulatory approach. The court not only disregarded the statutory language, as four judges noted in response to the suggestions for rehearing *en banc* (*see* App. at 26a), but also failed even to acknowledge the responsibility and special expertise of the NRC in administering the Act. The court of appeals' decision, moreover, will have an immediate nationwide impact; there is no possibility that a conflict in the circuits will develop regarding the Commission's authority to implement Section 306 by means of the Policy Statement. When so flawed an

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6. Although utilities undoubtedly would be called upon to make certain expenditures in connection with any training program, there is no question that the nuclear industry has committed substantial resources to effectuating the Policy Statement. For example, in response to Public Citizen's 1986 request for rulemaking to implement Section 306, one of NUMARC's 49 member utilities stated that, in the period immediately following issuance of the Policy Statement, it ordered an $8 million control room simulator, committed another $8 million to replace an existing simulator, developed and implemented a training program at a new maintenance and radiation protection training facility, dedicated 31,000 square feet of classrooms, laboratories and offices to support its training efforts and increased its training staff by 50 percent. Letter from Warren Owen, Executive Vice President, Duke Power Co., to NRC Secretary Samuel Chilk (July 10, 1986) (available in NRC Public Document Room, Accession No. 8607170298 860711).

appellate opinion will have so far-reaching an effect, review by this Court is appropriate.

I.

This Case Raises An Important, And Previously Undecided, Question Whether The NRC's Choice Of A Policy Statement, Instead Of Prescriptive Regulations, As The Best Means To Promote Its Safety Objectives In The Training Of Nuclear Power Plant Operating Personnel Is Permissible Under Section 306 Of The Nuclear Waste Policy Act.

A. The Decision Below Striking Down The NRC's Determination Of How Best To Ensure Proper Training Of Nuclear Power Plant Personnel Departs From The Plain Language Of The Act And Impermissibly Circumvents *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

1. The court of appeals avoided any consideration of the consequences of its decision by stating that its holding was compelled by the language of Section 306. As Judge Williams declared, however, the court's conclusion in fact departed from the plain language of the Act. *See* App. at 26a. Section 306 directs the NRC "to promulgate regulations, *or other appropriate Commission regulatory guidance*" (emphasis added). The court nevertheless held that the NRC must promulgate only mandatory requirements. Under this reading, the term "regulatory guidance" is "completely shorn" from the statute (App. at 26a), a method of interpretation that this Court consistently has rejected. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 633 (1973). Such an approach is particularly inappropriate where Congress used the disjunctive three times in Section 306. Disregarding "the disjunctive 'or' . . . rob[s] the [next following] term . . . of its independent and ordinary significance." *Reiter*, 442 U.S. at 338-39.

The flaw in the court of appeals' analysis is exacerbated because the term that the court excised from the statute has — and, at the time that the Act was passed, already had — a settled meaning as an integral part of NRC parlance, practice and process. *See Natural Resources Defense Council v. NRC*, 666 F.2d 595, 597-98 (D.C. Cir. 1981); *Gulf States Utilities Co.*, 6 N.R.C. 760 (1977). Indeed, the Commission regularly uses administrative mechanisms, such as policy statements, regulatory guides, bulletins, information notices and generic letters, to supplement its formal regulatory actions.[7] As the Atomic Safety and Licensing Appeal Board observed in *Gulf States*, describing one, fairly prevalent, form of regulatory guidance:

> For their part, and as their title suggests, regulatory guides are issued [by the NRC] for the basic purpose of providing guidance to applicants with respect to, *inter alia*, acceptable modes of conforming to specific regulatory requirements. But they are not regulations *per se* and are not entitled to be treated as such . . . .

6 N.R.C. at 772.

Of particular significance to this case, during the five years immediately preceding passage of the Act, the Commission issued nineteen statements articulating its policies. These policy statements ranged from "Program for Resolution of Generic Issues Related to Nuclear Power Plants" (43 Fed. Reg. 1565 (1978)) to "Planning Basis for Emergency Responses to Nuclear Power Reactor Accidents" (44 Fed. Reg. 61,123 (1979)) to "Nuclear Power Plant Accident Considerations Under the National Environmental Policy Act of 1969" (45 Fed.

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7. For example, in the five years predating passage of Section 306, the NRC issued 19 policy statements, 156 regulatory guides, 73 bulletins, 211 generic letters and 250 notices to nuclear power plant licensees.

Reg. 40,101 (1980)). As is evident from these titles, the Commission repeatedly has used regulatory guidance in the form of policy statements to instruct the nuclear power industry on major issues of public health and safety.

In fact, the NRC elected to issue policy guidance regarding the steps to be taken by both the Commission and nuclear plant licensees in the aftermath of the Three Mile Island accident. *See* Statement of Policy; Further Commission Guidance for Power Reactor Operating Licenses, 45 Fed. Reg. 85,236 (1980). A total of 10,514 instructions were issued to licensees as a result of the NRC's evaluation of the Three Mile Island accident, most of which were not implemented by specific changes in the NRC's regulations, but rather through a variety of administrative mechanisms, including policy statements and other regulatory guidance.

In short, to the Commission, "regulatory guidance" is a long-established and well-understood term of art. In a legislative direction to the NRC, Congress must be presumed to have used language as the NRC would have understood and applied it. *See Corning Glass Works v. Brennan,* 417 U.S. 188, 201-02 (1974); *United States v. Cuomo,* 525 F.2d 1285, 1291 (5th Cir. 1976). The court of appeals conceded that "[t]o give 'guidance' certainly can mean, in ordinary parlance, to give advice or suggestions" (901 F.2d at 154, App. at 14a) and that the word "guidance" has a "heavily optional flavor" (901 F.2d at 155, App. at 15a). The opinion below, therefore, should have stopped when the panel first recognized, as the NRC long has done, that guidance is non-binding.

2. The court below, however, not only refused to accord "regulatory guidance" its ordinary meaning, but further interpreted that term for purposes of the Act to mean "some form of mandatory instruction." 901 F.2d at 156, App. at 19a. In so ruling, the court focused on additional language of Section 306 which directs the Commission to "establish . . . instructional

requirements"[8] for the training of civilian nuclear power plant operating personnel. Reasoning that "requirements" can be established only by enforceable regulations, the court concluded that Congress plainly and unambiguously intended regulatory guidance to mean "mandatory requirements." 901 F.2d at 158, App. at 23a. The court, therefore, found that the NRC's Policy Statement was inconsistent with the plain meaning of Section 306 and there was no need to defer to the agency's interpretation of the Act under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The court of appeals' reading of Section 306 is impermissible; as noted above, it reads language out of the statute. At most, even accepting the lower court's understanding of the undefined term "instructional requirements," that term in juxtaposition with "regulatory guidance" can lead only to the conclusion that the Act is ambiguous. Under that circumstance, *Chevron* dictates that the court must defer to the Commission's interpretation of the statute if it is reasonable and consistent with the statutory purpose. *Chevron*, 467 U.S. at 844-45; *see Young v. Community Nutrition Institute*, 476 U.S. 974, 979-82 (1986). The court of appeals, however, ignored the NRC's expertise and never made the required *Chevron* step two inquiry.

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8. The court of appeals did not hesitate in finding the meaning of "establish . . . instructional requirements" to be clear. The verb "to establish," however, does not necessarily mean, as the court concluded, "to create." *See* 901 F.2d at 158, App. at 23a. It may mean "to put on a firm basis" or "to put into a favorable position." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 425 (1988). It also may mean "to assist, support, or nurture so that stability and continuance are assured." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 778 (1971). In this sense, the Commission's implementation of Section 306 complies with the Act since the Policy Statement does "establish" the requirements of the industry's training accreditation program.

The decision below thus offers a roadmap for evasion of *Chevron*'s mandate. Any statute can be deconstructed under the court of appeals' method; if a court may excise words from legislation, give the remainder of the statute an ostensible plain meaning, and then use that judicially crafted meaning to set aside the considered views of the responsible agency, judges will be free to disregard agency expertise whenever it strikes their fancy.

The dangers inherent in such an approach are compounded by the court's use of a single statement from the legislative history to bolster its finding of a plain meaning that does not appear in the statutory text. Even if that statement supported the court's reading of the Act — and it does not[9] — it is apparent that Congress as a whole could not have been aware of the remark. As

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9. The court below cites a passage from the *Congressional Record* in which Senator Weicker indicated "that there was a need for the NRC immediately to 'undertake the effort to establish *firm regulations and guidelines* for [operator] training programs' . . . ." 901 F.2d at 156, App. at 18a (quoting 128 Cong. Rec. 32,543 (1982) (statement of Sen. Weicker)) (emphasis and bracket added by court). Aside from the infirmity of looking for statutory construction to the remarks of a single legislator (*Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)), the fact remains that Senator Weicker used the conjunctive and Congress used the disjunctive. Moreover, the conceptual antecedent of Section 306 is the Kemeny Commission Report and, as previously noted (*see* Statement, *supra*, at 4-5), that Report found prescriptive regulations to be a negative factor in nuclear safety. In addition, in one of a series of reports to Congress on the Commission's implementation of Section 306, as required by the Act, NRC Chairman Palladino advised Senator Weicker that the Commission intended to issue a policy statement "endorsing the Institute of Nuclear Power Operations (INPO) managed Training Accreditation Program" and "to refrain from additional new rulemaking . . . for a period of at least two years . . . ." Letter from NRC Chairman Nunzio Palladino to Senator Lowell Weicker (Dec. 31, 1984) (available in NRC Public Document Room, Accession No. 8501100705 841231). Senator Weicker did not object to this course.

Representative Markey stated, complaining of the hasty manner in which the Senate adopted several amendments (including Section 306) and then returned them for approval to the House:

> There is not a Senator who could tell us what is in this bill. Fifteen minutes of debate for 18 amendments. . . . Eight or ten Senate staffers have drafted a nuclear waste bill that they have handed us on a take-it or leave-it basis.

128 Cong. Rec. 32,948 (1982) (statement of Rep. Markey). If the combination of isolated statutory terms with occasional floor statements may be used to cobble together a plain meaning, principles of deference to agency expertise will become illusory.

B. Thwarting The NRC's Policy For Enhancing Operational Safety Raises A Critical Issue Of National Importance.

This case is about nuclear safety. The NRC's choice of a Policy Statement over prescriptive regulations constituted a major substantive decision, not a mere selection of regulatory form. Instead of the fixed requirements for adequate performance inherent in a mandatory rule, the Commission deliberately adopted a policy framework that permitted and encouraged nuclear utilities, in their industry-developed training programs, to aim for and ultimately achieve a training and performance level measured by INPO standards of excellence. The system, in fact, has achieved its purposes and expectations.

In wrongly overturning the Commission's decision to issue the Policy Statement, the court of appeals has undermined a vital element in the nation's nuclear safety program. The consequences of reversing the Commission's action should be clearly understood. As noted, the lower court's decision undermines an industry self-improvement program, fostered by the NRC,

that has been the cornerstone of post-Three Mile Island efforts to promote professionalism and the achievement of safety objectives measured by standards of excellence rather than a "regulatory dependency" which equates operational safety to compliance with regulatory requirements. Regulations set requirements that, by their very nature, are aimed at enforcing adequate levels of performance. INPO initiatives seek the highest possible performance levels, applying supportive industry resources and exerting peer pressure to achieve those performance levels. A central lesson of the Three Mile Island accident, driven home by the Kemeny Commission, is that a safety regime that relies on regulatory requirements and creates an environment of industry dependence on them is shortsighted regulatory policy, disserving operational safety and the public interest in it. *See* Statement, *supra,* at 4-5.

For an industry self-improvement program to be viable, moreover, it cannot be regulation in another guise. While pointedly disagreeing with the *Public Citizen II* panel's reading of Section 306, Judge Williams nonetheless assumed it "not beyond the reach of agency expertise to devise 'regulations' that preserve most if not all of the flexibility the Commission sought and, correctly I think, believes lawful." App. at 26a. Regrettably, the assumption that there can be a benign regulatory substitute for the Policy Statement is mistaken. Adoption by the Commission of training regulations would be a grievous blow to industry self-improvement and would mark a long step backward to the pre-Three Mile Island regulatory era decried by the Kemeny Commission. If the NRC is forced to establish prescriptive regulations, the industry inevitably will be diverted from its focus on

achieving higher standards to evaluating specific regulatory requirements and then developing programs to ensure compliance.[10]

Even a so-called "simple rule" adopting or in some way codifying the current INPO-managed program will be destructive of the industry self-improvement initiatives that the NRC has sought to foster. Regulating to standards established by INPO or setting regulatory requirements that INPO would then have to enforce would make INPO a *de facto* agent of the NRC, wholly compromising INPO's ability to promote performance levels that exceed regulatory requirements. The existing program, after all, is premised on the judgment that safety may best be assured by the diligence and initiative of plant personnel; that diligence is achieved by making operators realize that they have ultimate responsibility for the safe operation of their plants. According to the Kemeny Commission, "it is an absorbing concern with safety that will bring about safety." Report at 9. Making INPO a regulatory surrogate of the NRC would run directly counter to this goal. As the NRC explained below, in seeking rehearing, "the panel's decision would . . . plac[e] the NRC astride the industry developed program," an outcome that "may well undercut the NRC's success in winning the industry's enthusiastic cooperation in the vital area of nuclear personnel training." NRC Petition for Rehearing and Suggestion for Rehearing *En Banc* at 2, *Public Citizen v. NRC*, 901 F.2d 147 (D.C. Cir. 1990) (No. 89-1017). The NRC added that "forcing the agency to divert resources to an

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10. As the Kemeny Commission found: "The existence of a vast body of regulations by NRC tends to focus industry attention narrowly on the meeting of regulations rather than on a systematic concern for safety. Furthermore, the nature of some of the regulations . . . may in some instances have served as a deterrent for utilities or their suppliers to take the initiative in proposing measures for improved safety." Report at 20.

area where an existing program already has achieved much success is imprudent." *Id.* at 3.

The courts do not have responsibility for determining whether policy guidance or prescriptive regulations are the best way to promote operational safety. This Court, however, does have a grave responsibility to ensure that the court of appeals, in denying the NRC authority to make that choice, correctly determined what Congress intended in Section 306.

II.

This Case Raises An Issue Of Major Importance, Which Has Not Been Resolved By This Court, Concerning The Circumstances Under Which Administrative Action Long Since Accepted As Final By Courts, Agencies, And Affected Public And Private Interests May Be Subjected To Judicial Review.

The flaw in the court of appeals' holding on the merits is compounded by the untimeliness of Public Citizen's challenge. As explained above, the nuclear industry has invested enormous resources in its training program. *See supra* n.6. In doing so, it has relied on the finality of the NRC's conclusion that industry efforts, if effective, would be the central element of the continuing effort to improve performance at nuclear facilities. *See* 50 Fed. Reg. at 11,148, App. at 29a. The utility of that expenditure has now, belatedly, been called into question.

The industry thought the issue settled several years ago when, twenty months after the Commission promulgated its 1985 Policy Statement, Public Citizen and a group of other organizations sought to challenge the validity of that action in the federal courts. *See* Statement, *supra*, at 7-8. Public Citizen argued then that its petition for judicial review was timely, notwithstanding the earlier deadlines set forth in the Hobbs Act and the Nuclear Waste Policy Act, because Public Citizen was

calling into question the "NRC's *ongoing* failure to promulgate binding regulations pursuant to [Section] 306." *Public Citizen I*, 845 F.2d at 1107. In dismissing the petition as time-barred, the court of appeals stated:

> The agency has acted. Its Policy Statement is a formal product of the Commission, published in the Federal Register, and expressly stating that it is "responsive to the mandate of the Nuclear Waste Policy Act for regulatory guidance on training and qualifications for nuclear power plant personnel [*i.e.*, § 306]." . . . . Representatives of the nuclear power industry state that it has relied on and sought to comply with the Statement, . . . and petitioners offer no reason to doubt that claim.
>
> . . . .
>
> Our acceptance of petitioners' argument would make a nullity of statutory deadlines. Almost any objection to an agency action can be dressed up as an agency's failure to act.

Id. at 1108 (citations omitted; bracket in original).

In 1988, six months after the decision in *Public Citizen I*, the NRC issued the three "minor" and "non-controversial" Amendments to the Policy Statement. *Public Citizen II*, 901 F.2d at 149, 150, App. at 4a, 5a; *see* 53 Fed. Reg. at 46,603-04, App. at 35a-39a. Public Citizen (and a slightly different group of other organizations) promptly returned to court. Rather than mount a challenge to the substance of the 1988 Amendments, however, Public Citizen sought judicial review solely in order to renew its frustrated attack upon the Commission's 1985 decision to implement Section 306 by means of the Policy Statement. *See* Statement, *supra*, at 9-10. This time the court below, speaking through a different panel, ruled the petition timely filed because, in the words of the court, issuance of the Amendments "necessarily raise[d] the lawfulness of the original policy

[statement], for agencies have an everpresent duty to insure that their actions are lawful." *Public Citizen II*, 901 F.2d at 152, App. at 9a.

The court of appeals' "everpresent duty" test breaks with precedent and expands its jurisdiction to review agency action beyond the realm of reason. Under the court's conception of its power, the most minor modification of any regulation or administrative policy will open to judicial scrutiny basic issues related to that regulation or policy which have long since been thought settled. This decision is not confined to circumstances where the question is whether an agency must issue binding regulations rather than a policy statement; the court's holding permits challenges to any agency action that can be alleged to be "violative of statute" (901 F.2d at 152, App. at 9a) – which is, of course, any agency action. If allowed to stand, therefore, the decision below will nullify statutory time limits on petitions for judicial review, will dissuade agencies from fine-tuning their regulations or policies, and will jeopardize the reliance interests of those parties who follow the rules.[11]

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11. The court of appeals found support for its holding in its conclusion that, even if the 1989 "challenge to the lawfulness of the NRC's action was untimely, Public Citizen could file a petition for rulemaking and then raise its claim of unlawfulness when the Commission denied the petition. Such a requirement would be a waste of everyone's time and resources." 901 F.2d at 152, App. at 10a (footnotes omitted). This suggestion ignores the fact that Public Citizen petitioned in 1986 for rulemaking to implement Section 306, saw its petition denied by the NRC in 1987, and chose not to seek further review of that denial. *See Public Citizen I*, 845 F.2d at 1108-10. As the court of appeals has held in similar circumstances, "a party who has failed to file for review [of a denial of a request for agency action] within the prescribed limitations period cannot obtain a new filing period by the simple expedient of filing a new request for the same agency action." *National Rifle Association v. Federal Election Commission*, 854 F.2d 1330, 1334 (D.C. Cir. 1988).

Placed in context, this case involves a radical extension of the so-called "reopening rule" of *Montana v. Clark*, 749 F.2d 740 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985). There, the court of appeals held that where an agency, in amending a long-standing regulation, gives "affirmative indications that [it] evaluated the entire substance of the regulation," the amendment reopens the entire regulation to judicial review. 749 F.2d at 744.

Until *Public Citizen II*, the D.C. Circuit applied the "reopening rule" judiciously, respecting the finality of agency actions and the reliance interests of those subject to administrative regulation. In cases in which the court of appeals found that an agency had, by amending or modifying a rule or policy, opened to judicial review an earlier agency decision related to that rule or policy, it did so because the record indicated clearly that the agency had, in fact, reconsidered the earlier decision. *See, e.g., Environmental Defense Fund v. EPA*, 852 F.2d 1316 (D.C. Cir. 1988), *cert. denied sub nom. American Mining Congress v. Environmental Defense Fund*, 109 S. Ct. 1120 (1989); *Colorado Interstate Gas Co. v. FERC*, 850 F.2d 769 (D.C. Cir. 1988); *Association of American Railroads v. ICC*, 846 F.2d 1465 (D.C. Cir. 1988); *Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988).

Similarly, until *Public Citizen II*, the D.C. Circuit declined to use an agency's amendment or modification of a rule or policy as a pretext to review a longstanding agency decision related to the amendment or modification where the record lacked affirmative indications that the agency had reconsidered its underlying decision. *See, e.g., Massachusetts v. ICC*, 893 F.2d 1368 (D.C. Cir. 1990); *American Iron & Steel Institute v. EPA*, 886 F.2d 390 (D.C. Cir. 1989), *cert. denied sub nom. American Mining Congress v. EPA*, 110 S. Ct. 3237 (1990); *Raton Gas Transmission Co. v. FERC*, 852 F.2d 612 (D.C. Cir. 1988).

The opinion of the court below dramatically alters the "reopening rule" in a manner that promises to have significant untoward consequences. The NRC's 1985 Policy Statement did not state or even suggest that the Commission would ever reconsider its determination that regulatory guidance in the form of a policy statement satisfied the mandate of Section 306 for agency action.[12] The Commission's decision on the legality of the Policy Statement was, in short, a final agency decision reviewable in 1985. *See Public Citizen I*, 845 F.2d at 1108. In issuing the 1988 Amendments, the Commission neither revisited nor reendorsed this three-year old decision, and the Amendments themselves neither purported to do so nor had such effect. *See* 53 Fed. Reg. at 46,603-04, App. at 35a-39a.

In articulating its "everpresent duty" test and holding that the issuance of the "minor" and "noncontroversial" Amendments "necessarily raise[d] the lawfulness of the original policy" (901 F.2d at 152, App. at 9a), the court below effectively created an irrebuttable presumption that whenever an agency amends or modifies any aspect of a rule or policy, it has reconsidered, reendorsed and thereby reopened to judicial review the legality of all other aspects of that rule or policy, no matter how minor

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12. Although not the basis of the holding below, the court of appeals concluded that the 1988 Amendments made "permanent" what had been a "temporary" NRC decision to implement Section 306 by means of the Policy Statement (*see* 901 F.2d at 151, App. at 6a-8a) and that, therefore, the "Commission's characterization of its 1985 actions as a final decision on the legality of not issuing training requirements is doubtful" (901 F.2d at 151, App. at 8a). This conclusion is preposterous, for it supposes that the NRC deliberately issued a policy of undetermined legality, calling for a substantial industry commitment, with the expectation that it would revisit the issue of the policy's legality in two years. To the contrary, the 1985 Policy Statement could not be clearer in stating that it "is responsive to the mandate of [Section 306]" and would remain in effect "as long as the industry [training] programs produce the desired results." 50 Fed. Reg. at 11,147, 11,148, App. at 28a, 29a.

the amendment or modification or how well established the other aspects of the rule or policy. Thus, the NRC properly noted below, in seeking rehearing, that

> [t]he clear implication of the panel's "everpresent duty" principle is that *all aspects* of any agency rule or policy are subject to judicial challenge whenever *any* amendatory action, no matter how minor, is taken with respect to it.

NRC Petition for Rehearing and Suggestion for Rehearing *En Banc* at 9, *Public Citizen v. NRC*, 901 F.2d 147 (D.C. Cir. 1990) (No. 89-1017).[13] The court below established a substantial disincentive for agencies ever to modify regulatory programs or for regulatees expeditiously to make substantial and long-term commitments of resources to implement such programs. Indeed, if the NRC in this case had taken no action after 1985 regarding its implementation of Section 306, there would be no question that the Hobbs Act or the Nuclear Waste Policy Act would stand as a jurisdictional bar to judicial review of the Commission's 1985 decision on the legality of the Policy Statement.

The chilling effect that the court of appeals' decision will have on agencies' oversight of their actions and the public's ability to rely on the finality of such actions is distressing with respect to agencies in general; it is profoundly disturbing with respect to an agency that

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13. Indeed, the opinion below already has been employed to argue that the NRC's modification in 1989 of its regulations governing the criteria a party must meet to intervene and raise contentions in licensing proceedings "necessarily raises questions regarding the validity of" a particular application of the Commission's standards for the admission of late-filed contentions — which standards were adopted by the NRC in 1972 and were not reconsidered by the Commission in the context of the 1989 rulemaking. *See* Reply Brief of Petitioners at 3-4, *Union of Concerned Scientists v. NRC*, (D.C. Cir.) (No. 89-1617) (filed Aug. 15, 1990).

regulates matters affecting public health and safety. The decision deserves review by this Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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August 29, 1990

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 1, 1990 Decided April 17, 1990

No. 89-1017

PUBLIC CITIZEN, *et al.*,

PETITIONERS,

v.

NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

RESPONDENTS,

NUCLEAR UTILITY MANAGEMENT AND
RESOURCES COUNCIL,

INTERVENOR.

ON PETITION FOR REVIEW OF AN ORDER OF THE NUCLEAR REGULATORY COMMISSION

Eric R. Glitzenstein, with whom *Diane Curran, David C. Vladeck* and *Alan B. Morrison* were on the brief, for petitioners.

John F. Cordes, Jr., Attorney, Nuclear Regulatory Commission, with whom *William C. Parler,* General Counsel, *E. Leo Slaggie,* Special Counsel, Nuclear Regulatory Commission, *Edward Shawaker* and *John Bryson,* Attorneys, Department of Justice, were on the brief, for respondents. *William H. Briggs, Jr.* and *Karla D. Smith,* Attorneys, Nuclear Regulatory Commission, and *David C. Shilton,* Attorney, Department of Justice, also entered appearances for respondents.

John T. Boese, with whom *Marcus A. Rowden* was on the brief, for intervenor.

Before: WALD, *Chief Judge,* and MIKVA and EDWARDS, *Circuit Judges.*

Opinion for the Court filed by *Chief Judge* WALD.

WALD, *Chief Judge:* The question presented is whether the United States Nuclear Regulatory Commission must promulgate mandatory instructional requirements for the personnel training programs of civilian nuclear powerplant licensees, or whether the Commission may simply issue a "Policy Statement" that encourages, but does not compel, licensees to create training programs that meet criteria identified in the Policy Statement. We hold that Congress has ordered the Commission to prescribe criteria to which training programs must adhere. Accordingly, since the Commission has failed to do so, we remand the case for further proceedings.

I. BACKGROUND

In 1979, an accident at the Three Mile Island nuclear powerplant in Pennsylvania shocked the nation. A presidential commission subsequently announced that inadequate training of employees at nuclear powerplants contributed significantly to the risks posed by such plants. *See* Kemeny Commission, Report of the President's Commission on the Accident at Three Mile Island (1979). In 1983, Congress enacted §306 of the Nuclear Waste Policy Act of 1982 [sic], 42 U.S.C. §10226, which provides in relevant part,

> The Nuclear Regulatory Commission is authorized and directed to promulgate regulations, or other appropriate Commission regulatory guidance, for the training and qualifications of civilian nuclear powerplant operators, supervisors, technicians, and other appropriate operating personnel. Such regulations or guidance shall establish . . . instructional

> requirements for civilian nuclear powerplant licensee personnel training programs. Such regulations or other regulatory guidance shall be promulgated by the Commission within the 12-month period following January 7, 1983[.]

In 1985, the Nuclear Regulatory Commission ("NRC" or "Commission") purported to fulfill its responsibilities under §306 by promulgating the "Commission Policy Statement on Training and Qualification of Nuclear Power Plant Personnel," 50 Fed. Reg. 11,147 (1985) ("Policy Statement"). The Policy Statement noted that the industry's self-regulatory efforts had made progress in improving training programs. Accordingly, the Commission made a temporary decision not to engage in rulemaking, but to monitor the success of industry programs over a two-year period. Therefore, although the Policy Statement set forth five elements as being "essential to acceptable training programs," *id.* at 11,148, it did not mandatorily require that licensees' training programs satisfy these elements. Similarly, although the Policy Statement encouraged all licensees to have their training programs accredited by the Institute of Nuclear Power Operations, the industry's self-regulatory body, it did not actually make accreditation mandatory. The Commission stated that it would "evaluate the possible need for further NRC action based on the success of industry programs after a two-year period." *Id.* at 11,147.

In 1986, petitioner Public Citizen petitioned the Commission to issue binding regulations regarding training. First, it asked the NRC for rulemaking with respect to training, claiming among other things that the Policy Statement was insufficient to satisfy the Commission's obligations under §306. While its petition before the Commission was pending, Public Citizen sought review in this court of the Commission's failure to issue

regulations. While the lawsuit was pending, the Commission denied Public Citizen's rulemaking petition. 52 Fed. Reg. 3121 (1987). Public Citizen did not seek court review of that denial, perhaps because it already had a lawsuit pending concerning the Commission's actions. This court, however, dismissed the pending action as having been filed too late to challenge the Commission's 1985 Policy Statement and too early to be a petition for review of the denial of Public Citizen's 1986 petition for rulemaking. *Public Citizen v. NRC,* 845 F.2d 1105 (D.C. Cir. 1988). Public Citizen's efforts in 1986 thus came to naught.

Then, in 1988, the Commission revisited the training issue. As promised, it reviewed the industry's efforts to satisfy the training goals outlined in the Policy Statement, and concluded that they were working. Accordingly, the Commission decided once again to refrain from making rules regarding training, and instead republished the Policy Statement with some minor amendments. 53 Fed. Reg. 46,603 (1988). From this action, the petitioners (collectively referred to as "Public Citizen") petitioned for review.

II. TIMELINESS

Before we reach the merits of Public Citizen's challenge, we must decide whether it is timely. Public Citizen's petition can be viewed as arising under either the review provisions of the Hobbs Act or those of the Nuclear Waste Policy Act, which set deadlines of 60 and 180 days, respectively, for review of NRC action. *See* 28 U.S.C. §§2342(4), 2344; 42 U.S.C. §10139(c). Public Citizen filed its petition for review within 60 days of publication of the revised Policy Statement in 1988, but the NRC and the intervenors claim that it is untimely as not filed within 60 or 180 days of the NRC's promulgation of the *original* Policy Statement in 1985. They do not accept Public Citizen's contention that the NRC first

issued a temporary Policy Statement in 1985, and then in 1988 reconsidered the entire training issue and decided to make its interim policy permanent. Rather, NRC and intervenors claim that the Commission made its final and permanent decision in 1985 not to issue mandatory regulations, and, in 1988, made only minor amendments to that basic policy. The Commission's 1988 actions, they argue, did not render the earlier decision not to issue mandatory regulations subject to new court challenge. According to the NRC and the intervenors, Public Citizen can now challenge only the noncontroversial 1988 amendments.

In several recent cases, this court has wrestled with the problem of whether an agency's restatement of an existing rule or policy in a rulemaking format makes the rule or policy challengeable anew, even where otherwise barred by a statutory time limit. The court has held that where an agency's actions show that it has not merely republished an existing rule in order to propose minor changes to it, but has reconsidered the rule and decided to keep it in effect, challenges to the rule are in order. "[T]he general principle [is] that if the agency has opened the issue up anew, even though not explicitly, its renewed adherence is substantively reviewable." *Association of American Railroads v. ICC,* 846 F.2d 1465, 1473 (D.C. Cir. 1988). We have, for instance, inferred that an agency has reopened a previously decided issue in a case where the agency (1) proposed to make some change in its rules or policies, (2) called for comments only on new or changed provisions, but at the same time (3) explained the unchanged, republished portions, and (4) responded to at least one comment aimed at the previously decided issue. *State of Ohio v. U.S. E.P.A.,* 838 F.2d 1325, 1328 (D.C. Cir. 1988). The language of *State of Ohio* appeared to suggest that the time period for review would start afresh in *any* case meeting the four factors just stated (and, *a fortiori,* in a case meeting factors 1, 3, and 4, and in which the agency called for

comments on the whole rule, including unchanged portions). Nonetheless, more recently *American Iron & Steel Institute v. U.S. E.P.A.*, 886 F.2d 390 (D.C. Cir. 1989), placed some limits on that general principle. The court there said that "[t]he 'reopening' rule of *Ohio v. EPA* is not a license for bootstrap procedures by which petitioners can comment on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency has re-opened the issue." 886 F.2d at 398.

It appears, therefore, that the crucial question at this juncture is whether an agency has in fact reopened an issue, explicitly or implicitly; the four factors mentioned in *State of Ohio* are indeed relevant evidence of reopening, but the court cannot stop there. It must look to the entire context of the rulemaking including all relevant proposals and reactions of the agency to determine whether an issue was in fact reopened. If in proposing a rule the agency uses language that can reasonably be read as an invitation to comment on portions the agency does not explicitly propose to change, or if in responding to comments the agency uses language that shows that it did in fact reconsider an issue, a renewed challenge to the underlying rule or policy will be allowed. *Compare* 886 F.2d at 398 (agency did not make *sustained* attempt to explain old rule and responded to comments by at most *briefly* reiterating its prior reasoning; issue not reopened) *with Association of American Railroads v. ICC*, 846 F.2d at 1473 (agency language was ambiguous, but because in proposing rule it had said it would attempt to "harmonize" existing decisions, a commenter who offered a compelling reason to abandon old decision would presumably have been heeded; issue reopened).

In the present case, there is fortunately no need to quibble about the precise quantum of evidence sufficient to show that the NRC reopened its prior decision not to issue training regulations. Though the Commission now claims that it never reexamined its 1985

decision, and that the petitioners therefore may challenge only the minor amendments made in 1988 to the Commission's 1985 Policy Statement, the record before us could not be clearer that the Commission's 1985 action represented a temporary decision not to engage in rulemaking on mandatory training standards, and that the 1988 action reexamined this choice and made it permanent. We cite here just a few of the many indications that this is so:

> (1) The 1985 Policy Statement said that the NRC would "refrain from new rulemaking in the area of training for a minimum period of two years," and that it would "evaluate the possible need for further NRC action based on the success of industry programs after a two-year period." 50 Fed. Reg. at 11,147.
>
> (2) In 1987, after Public Citizen petitioned the NRC for rulemaking, the Commission stated in a letter to Public Citizen that the two-year evaluation period would "expire" in early 1987. Supplemental Appendix 242.
>
> (3) In a Federal Register statement explaining the denial of Public Citizen's rulemaking petition, the Commission stated, "[t]he Commission decided [in 1985] to withhold action on promulgating new training and qualifications regulations during a short evaluation period." The Commission also noted that it would "revisit the entire training issue around March 20, 1987." 52 Fed. Reg. at 3124-25.
>
> (4) The Commission's 1988 statement said that "[t]he two-year evaluation period ended March 20, 1987," that "the staff evaluated the results of the INPO accreditation program," and that "the NRC concludes that the program is effective." 53 Fed. Reg. at 46,604.

In light of these statements, we cannot but conclude

that the Commission, in 1988, reopened, reexamined, and reaffirmed its 1985 decision to use exhortation rather than binding regulations to improve the training of powerplant personnel. The evidence of reopening is in fact much stronger than required by our prior cases, for the Commission did not merely implicitly reexamine its former choice; it did so explicitly. This reconsideration makes the decision subject to renewed challenge.

At oral argument, the Commission offered a different reason why the decision to issue regulations [sic] should not be challengeable. The Commission argued that its 1985 action represented its final and unreconsidered decision on the *lawfulness* of not issuing binding regulations; the 1988 action reconsidered only the *wisdom* of that decision. Thus, even if the petitioners may now raise claims directed at the wisdom of failing to issue mandatory regulations (for example, that such action is arbitrary or capricious), they may not claim that the action is contrary to law.

We reject this argument. In the first place, in light of its statements quoted above, we think the Commission's characterization of its 1985 actions as a final decision on the legality of not issuing training requirements is doubtful. It spoke then in terms of "withhold[ing] action . . . during a short evaluation period," a decision which hardly raises the same legal question as a final decision not to issue training requirements. But even if we accepted the NRC's premise that it had made a final decision on the legality of not issuing mandatory regulations back in 1985, it still would not render the current challenge untimely. We held in *Environmental Defense Fund v. EPA,* 852 F.2d 1316 (D.C. Cir. 1988), *cert. denied,* 109 S. Ct. 1120 (1989), that to the extent that an agency's action "necessarily raises" the question of whether an earlier action was lawful, review of the earlier action for lawfulness is not time-barred. *Id.* at 1325; *see also Cities of Batavia, Naperville, etc. v. FERC,* 672 F.2d 64, 72 n.15 (D.C. Cir. 1982) ("While *a*

petition from an agency order cannot be filed after the statutory period for filing has run, it may be that *some of the issues* that might have been raised in that appeal are so inextricably linked to a subsequent agency opinion on another aspect of the same case, that those issues may be raised in a timely appeal from the second opinion.") (emphasis in original).

In this case, the agency has reconsidered and reinstated its original policy. Such action, we think, necessarily raises the lawfulness of the original policy, for agencies have an everpresent duty to insure that their actions are lawful. An agency can hardly be heard to say that at a time when it was considering whether to take a certain action, it would have steadfastly ignored a commenter's showing that the action was unlawful. *Cf. Association of American Railroads,* 846 F.2d at 1473. We therefore think that a challenge to lawfulness is now timely. *See National Ass'n of Greeting Card Publishers v. United States Postal Service,* 607 F.2d 392, 425 n.59 (D.C. Cir. 1979) (court may examine "prior agency action on which the validity of the later agency action under review depend[s]"), *cert. denied,* 444 U.S. 1025 (1980).

Furthermore, our holding is supported by this circuit's long-standing rule that although a statutory review period permanently limits the time within which a petitioner may claim that an agency action was procedurally defective, a claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of the petition. *See, e.g., NLRB Union v. FLRA,* 834 F.2d 191, 196 (D.C. Cir. 1987); *Natural Resources Defense Council v. NRC,* 666 F.2d 595, 601-02 (D.C. Cir. 1981); *Geller v. FCC,* 610 F.2d 973, 978 (D.C. Cir. 1979); *Functional Music v. FCC,* 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied,* 361 U.S. 813 (1959). Were we to hold in this case that Public Citizen's

challenge to the lawfulness of the NRC's action was untimely, Public Citizen could file a petition for rulemaking and then raise its claim of unlawfulness when the Commission denied the petition.[1] Such a requirement would be a waste of everyone's time and resources.[2] We believe the law to be that where an

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1. We have said that "a protestant, who could have but did not seek review, may not create the basis for a reviewable order by unilaterally petitioning for repeal or amendment of a regulation." *State of Montana v. Clark*, 749 F.2d 740, 744 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 919 (1985). However, as a footnote to that statement, we added that "where . . . the petitioner challenges the *substantive* validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review." *Id.* at 744 n.8. (emphasis in original). The *State of Montana* language therefore reflects our well-established rule that a procedural challenge to agency action must be brought within the statutuory review period or be forever barred.

Natural Resources Defense Council v. NRC, 666 F.2d 595 (D.C. Cir. 1981) has also been cited for the proposition that "those who have had the opportunity to challenge general rules should not later be heard to complain of their invalidity on grounds fully known to them at the time of their issuance." *Id.* at 602. However, that statement came at the end of a paragraph which clearly drew the distinction between procedural and substantive challenges, and which stated that "we have scrutinized regulations immune from direct review by reviewing the denial of a subsequent rulemaking petition which challenged the regulations on demonstrable grounds of *substantive* invalidity." *Id.* (emphasis in original). Indeed, although the court rejected as untimely the petitioners' procedural challenge to the rule at issue, it went on to reach the merits of the petitioners' substantive challenge, *id.* at 603-06, although that challenge was equally outside the statutory deadline and equally based on grounds previously known to the petitioners. Therefore, the *NRDC* statement as well clearly applies only to procedural challenges.

2. The general policy in federal practice and procedure is to consolidate related claims between two parties into one action *See, e.g.*, Fed. R. Civ. P. 13, 18 (joinder rules); *Mine Workers v. Gibbs*, 383 U.S. 715 (1966) (pendent jurisdiction). While we could not, of course, ignore a jurisdictional barrier in the name of judicial economy, *see Finley v. United States*, 109 S. Ct. 2003, 2010 (1989)

agency reiterates a rule or policy in such a way as to render the rule or policy subject to renewed challenge on any substantive grounds, a coordinate challenge that the rule or policy is contrary to law will not be held untimely because of a limited statutory review period.[3]

In a last-ditch effort to show untimeliness, the Commission claims that assuming it made a renewed decision not to promulgate regulations, that decision was not made in 1988, but in 1987, when, in a paper that was "made available to the public in the NRC public document room," Brief for Respondents at 23, the Commission approved a staff recommendation that it continue to defer rulemaking. Accordingly, the Commission claims, the timeliness of the petition for review should be measured from the 1987 date.

This argument borders on the frivolous. Although an agency has "considerable latitude in determining the event that triggers commencement of the judicial review period," *Associated Gas Distributors v. FERC*, 738 F.2d 1388, 1391 (D.C. Cir. 1984), it must do so reasonably, *Southland Mower Co. v. United States Consumer Product Safety Commission*, 600 F.2d 12, 13 (5th Cir. 1979), bearing in mind that "[b]efore any litigant reasonably can be expected to present a petition for review of an agency rule, he first must be put on fair notice that the rule in question is applicable to him." *Recreational Vehicle Industry Ass'n v. EPA*, 653 F.2d 562, 568 (D.C.

(policy of *Gibbs* does not extend to bringing new parties into a case), we think considerations of economy properly reinforce our decision that the NRC's restatement of its policy necessarily raises the issue of the policy's lawfulness, so as to bring that issue within our unquestioned jurisdiction to review the agency's most recent action.

3. This is not to say that there may not be some other bar to the challenge, such as *res judicata*, collateral estoppel, or failure to exhaust administrative remedies, and *stare decisis* may make such a challenge unlikely to succeed. Our holding relates only to the limitations imposed by a statutory review period. In this case, no other limitation applies.

Cir. 1981). We do not see how the mere placement of a decision in an agency's public files, without any other announcement, can start the clock running for review, particularly in view of the Hobbs Act's requirement that agencies promptly give notice of their final orders by service or publication, 28 U.S.C. §2344, and the Administrative Procedure Act's provision that no person may be adversely affected by a matter required to be published in the Federal Register and not so published, 5 U.S.C §552(a)(1). Potential petitioners cannot be expected to squirrel through the Commission's public document room in search of papers that might reflect final agency action.[4]

Accordingly, we find the petition for review to be timely.

III. MERITS

On the merits, the crucial question before us is one of the Commission's discretion to pursue its preferred regulatory philosophy. The NRC has decided that the best way to get civilian nuclear powerplant licensees to improve training in their powerplants is not to impose mandatory requirements upon them, but rather to create what is in effect a "model training code" for powerplant operators, and to urge that licensees voluntarily comply

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4. Furthermore, the documents in question here do not read anything like a final agency order. SECY-87-121, *reprinted* in Joint Appendix ("J.A.") 69-74, the staff document approved by the Commission, recommends that the Commission continue to defer rulemaking, but also recommends that the Commission direct the staff to continue to evaluate industry implementation of the Policy Statement and to revise the Policy Statement. J.A. 74. This is hardly the stuff of which final orders are made; indeed, the Commission's approval of the staff recommendations demonstrates that it was still in the process of reconsidering the Policy Statement. We doubt whether a challenge to the Commission's approval of SECY-87-121 would even have been within our jurisdiction to review final agency orders.

with this code. Normally, of course, an agency is free not to exercise its compulsory powers if it thinks simple exhortation would be sufficient to achieve its regulatory mission. The precise question at issue is whether Congress removed this discretion from the NRC by passing §306.

In resolving the difference between the interpretations of §306 offered by the petitioners and by the Commission, we apply the rules laid down in *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984). First, we must decide "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. In determining the intent of Congress, we must look to "the particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.,* 108 S. Ct. 1811, 1817 (1988), and we must employ traditional tools of statutory construction, including, where appropriate, legislative history. *Ohio v. United States Department of the Interior,* 880 F.2d 432, 441 (D.C. Cir. 1989). If the intent of Congress is clear, we must give it effect. 467 U.S. at 842-43 ("*Chevron* step one"). If, however, the statute is silent or ambiguous on a particular issue, we must defer to the agency's interpretation of the statute if it is reasonable and consistent with the statutory purpose. *Id.* at 844-45 ("*Chevron* step two"). We begin, therefore, by inquiring whether Congress made its intent on the question before us clear in §306.

A. The Language of §306

On its face, §306, quoted earlier, sets out four essential conditions for NRC compliance with its mandate:

> (1) The NRC's action must take the form of *regulations* or *other appropriate Commission regulatory guidance;*

(2) The NRC's action must *establish instructional requirements* for civilian nuclear powerplant licensee personnel training programs;

(3) The NRC's action must be *promulgated;* and

(4) The NRC's action must be promulgated *within 12 months of January 7, 1983.*

The two key phrases in §306 for our purposes are "regulatory guidance" and "establish . . . instructional requirements."

1. "Regulatory Guidance"

Section 306 does not compel the NRC to promulgate regulations; it requires regulations *or* other appropriate "regulatory guidance." Congress' use of the term "guidance" in §306 is what keeps this case from being trivial. To give "guidance" certainly can mean, in ordinary parlance, to give advice, or suggestions. The term is not inconsistent with the notion of mandatory regulations, but neither is it inconsistent with a hortatory, rather than a mandatory, administrative regime.

The section, of course, does not simply require "guidance"; it requires "regulatory guidance." However, we do not believe the modifier "regulatory" clarifies the ambiguity in the word "guidance." The term "regulatory guidance" is not a well-established term of art. Indeed, §306 appears to have been the first section in the entire United States Code to use the term, and a computer-assisted search reveals that apart from its use in §306, the term "regulatory guidance" now appears in just two other places in the Code. The first place is 15 U.S.C. §2641(a)(1), the "findings and purpose" section of the Asbestos Hazard Emergency Response Act (AHERA). Section 2641(a)(1) notes that because of the "lack of regulatory guidance" from the EPA, some schools have not undertaken response action to the problem of asbestos. The AHERA therefore requires the Administrator of

the EPA to promulgate regulations establishing procedures for determining whether asbestos is present in school buildings and defining and requiring the implementation of appropriate response actions. §2643.

The other place in which the term appears is in 20 U.S.C. §1234b(c), a section of the National Assessment of Educational Progress Improvement Act. The section deals with the ability of the United States to recover education funds improperly spent by states and localities. The section provides that recovery of misspent funds shall be reduced if there are mitigating circumstances; the term mitigating circumstances is narrowly defined to include only a few situations, such as when the state or locality actually and reasonably relies on erroneous written guidance provided by the Department of Education. §1234b(b)(2). The section concludes by saying that "[t]he Secretary shall periodically review the written requests for guidance submitted under this section to determine the need for new or supplementary regulatory or other guidance under applicable programs." §1234b(c).

This concluding distinction between "regulatory" and "other" guidance suggests that regulatory guidance is guidance provided by regulations. This provision seems to tell the Secretary to decide, based on the volume of requests for guidance received, whether a particular point could best be resolved by the issuance of a general regulation. Like the AHERA's curing of the "lack of regulatory guidance" by requiring the creation of binding regulations, this provision therefore suggests that "regulatory guidance" is not a mere suggestion, but guidance provided in a binding regulation.

However, we do not think these two usages of the term (both of which, incidentally, came after the enactment of §306) establish a clear meaning for the somewhat arcane term. The heavily optional flavor of the word "guidance" suggests that "regulatory guidance" could also mean guidance from a regulatory agency; that

is, the very sort of set of voluntary suggestions that the NRC has promulgated here. Accordingly, if §306 said only that the NRC was required to promulgate regulations or other appropriate regulatory guidance concerning plant personnel training, we would hold that it was ambiguous as a *Chevron* step one matter.

2. "Establish . . . Instructional Requirements"

However, apart from "regulations or other appropriate regulatory guidance," §306 provides another, clearer indication of Congress' intent. The statute decrees that the regulations or guidance, whatever they be, must "establish . . . instructional *requirements* for civilian nuclear powerplant licensee personnel training programs" (emphasis added). The word "requirements," unlike the word "guidance," clearly suggests a mandatory regime. Certainly in common parlance "requirement" means something compelled, not merely suggested.

More important, the congressional command to "establish requirements," unlike the command to give "regulatory guidance," is a familiar one. Numerous statutes instruct an agency to establish requirements, and almost always in a context that makes clear that the requirements must be mandatory. For instance, 30 U.S.C. §871 provides that "[e]ach coal mine shall be provided with suitable firefighting equipment . . . . The Secretary [of Labor] shall establish minimum requirements for the type, quality, and quantity of such equipment." One would hardly surmise from this language that Congress wanted the Secretary merely to exhort coal mine operators to have minimally suitable firefighting equipment on hand; indeed, 30 U.S.C. §861(b) provides that "[t]he purpose of this subchapter is to provide for the immediate application of mandatory safety standards[.]" Similarly, 22 U.S.C. §4022 provides that "[t]he Secretary [of State] shall establish foreign language proficiency requirements for members of the

Service who are to be assigned abroad . . . . The Secretary of State shall arrange for appropriate language training of members of the Service . . . in order to assist in meeting the[se] requirements." Clearly, the requirements must be met; one could not picture the Secretary merely exhorting his own subordinates to learn necessary foreign languages. Numerous other examples could be cited. *See, e.g.,* 15 U.S.C. §78o(c)(3) (SEC shall by rule or regulation establish minimum financial responsibility requirements for brokers and dealers); 42 U.S.C. §6922 (EPA shall promulgate regulations establishing standards which shall establish requirements for generators of hazardous waste). Congress uses very different language when instructing an agency to establish nonmandatory guidance. *See, e.g.,* 42 U.S.C. §6962(e) (EPA shall prepare guidelines for procuring agencies which shall "set forth recommended practices" for purchasing recycled goods).

Thus, when Congress commanded the NRC to "establish . . . instructional requirements," it used a common statutory formula and so must have intended to invoke the formula's clear, well-understood meaning. *Cf. Heckler v. Chaney,* 470 U.S. 821, 835 (although statute provided that those who violate its substantive provisions "shall be imprisoned . . . or fined," this language is commonly found in criminal statutes and does not divest enforcing agency of enforcement discretion). A call for "requirements" assumes that the regulated community will be required to follow training dictates.

B. Legislative History

The legislative history also supports our reading of the statutory text. Senator Lowell Weicker, the author of §306, stated that it "require[s] that the Nuclear Regulatory Commission—within the next 12 months—proceed to develop *firm regulations* for the proper training and

requalification of nuclear powerplant operators, supervisors, technicians, and other appropriate plant personnel." 128 Cong. Rec. 32,543 (1982) (emphasis added). Senator Weicker went on to say that there was a need for the NRC immediately to "undertake the effort to establish *firm regulations and guidelines* for [operator] training programs," *id.* (emphasis added), and that in view of the large number of plant personnel that would be hired over the next decade, "it would be folly to enter this period of intensive recruitment without *strict quidelines and regulations* outlining how these personnel are to be trained." *Id.* at 32,544 (emphasis added). Senator Weicker's statements clearly show that he intended the section to compel the NRC to establish mandatory requirements for operator training programs.

Of course, the remarks of a single legislator regarding a bill are not controlling as to its interpretation. *See, e.g., United States v. McGoff,* 831 F.2d 1071, 1090 (D.C. Cir. 1987).[5] In this case, however, the remarks simply reinforce what the language of the bill already makes clear: that Congress commanded the NRC to develop mandatory requirements. The remarks also strongly suggest that we are correct in reading the ambiguous

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5. The petitioners argue that we should give Senator Weicker's statements more weight than a single legislator's statements usually receive, because of the unusual circumstances surrounding the enactment of §306: the section was appended to the Nuclear Waste Policy Act on the last day of the legislative session, and since there was no time for it to go to committee, the bill's managers in the two houses of Congress negotiated the text of the section and established a legislative history by submitting statements and colloquies for publication in the Congressional Record. *See* 128 Cong. Rec. 32,944 (1982). This process, according to the manager for the House, represented "the full equivalent of a conference report." *Id.* Inasmuch, however, as we hold that the meaning the section itself is clear and that Senator Weicker's statements merely reinforce that meaning, we find it unnecessary to consider whether they should receive more weight than that usually accorded to statements of a key legislative player.

term "regulatory guidance" as meaning some form of mandatory instruction, at least in the context of this statute.

C. NRC Arguments

The NRC urges that we interpret the phrase "establish . . . instructional requirements" in light of the term "regulatory guidance." Since the latter term, according to the Commission, clearly provides that the Commission need not issue mandatory regulations, the term "requirements" cannot have its ordinary meaning. We disagree, however, for two reasons.

First, even if we assumed that the term "regulatory guidance" unambiguously referred to a set of nonmandatory suggestions, we would not agree that the Commission could satisfy its obligations under §306 by simply issuing such suggestions. The issuance of regulatory guidance would satisfy only *one* of the Commission's four clear obligations under §306. The second sentence of §306 unequivocally shows that whatever the Commission's regulatory guidance is, it must establish instructional requirements, and nonmandatory suggestions fail to do this. When Congress gives an agency its marching orders, the agency must obey all of them, not merely some. The NRC cannot claim to fulfill its obligations under §306 by issuing regulatory guidance unless the regulatory guidance establishes instructional requirements.

Second, we do not believe that the term "regulatory guidance" unerringly points to a set of nonmandatory suggestions. Rather, as discussed previously, we find that term itself to be ambiguous. Its usage in other statutes suggests that an equally plausible meaning is some form of mandatory instruction from a regulatory agency. Of course, when a statute that is entrusted to an administrative agency contains an ambiguous term, it is generally for the agency, rather than for this court, to

interpret that term, within the bounds of reason and consistently with the statute's purpose. But in this case, the NRC has taken the impermissible step of plucking the ambiguous term out of its context in the statute, interpreting it in a vacuum, and then twisting the meaning of the unambiguous term in the statute to fit its interpretation of the ambiguous one. This is going about statutory interpretation backwards. When a statute contains a clear term and an ambiguous term, the ambiguous term must be interpreted in light of the clear one, not vice-versa.

The NRC therefore erred in deciding that the term "requirements" was ambiguous in light of its reading of the term "regulatory guidance." Rather, the clear command that the NRC establish instructional requirements suggests that the ambiguous term "regulatory guidance" should be construed in accordance with the principle *ejusdem generis*: since "regulatory guidance" is a general term that is coupled with a specific one ("regulations"), it should take its meaning from the specific term. Whatever regulatory guidance is, it must share the crucial quality of regulations; that is, it must be mandatory.

The Commission also argues that its Policy Statement establishes what amount to requirements, in view of the practicalities of the relationship between the NRC and the regulated community of nuclear powerplant licensees. The Commission claims that its policy statement "require[s] licensees to develop personnel training programs that [meet] the guidelines or, if they contemplated any significant changes or delay, be prepared to justify their actions to the NRC or face NRC enforcement action." Brief for Respondents at 31. The Commission argues that "setting out clear guidelines for training programs in the policy statement and related documents, backed by vigorous oversight and an enforcement policy whereby enforceable orders or license conditions would issue if training or qualification

deficiencies were found to exist amount[s] to promulgating 'requirements' as the term is used in section 306." *Id.* at 30.

We simply do not see how these alleged characteristics of the current enforcement regime, even if accurately described, satisfy the congressional command to establish training "requirements." The Commission concedes that "unlike a regulation, a policy statement is not a 'binding norm' that is immediately enforceable when its terms are violated." *Id.* at 31 n.22. At oral argument, the Commission's counsel conceded further that the failure of a licensee to follow the suggestions contained in the Policy Statement could not itself be the basis for an enforcement action against the licensee; the Commission would be obliged to show that the licensee's plant was unsafe as that term is defined by statute and the NRC's enforceable regulations. Thus, when the Commission claims that "enforceable orders or license conditions would issue if training or qualification deficiencies were found to exist," it cannot mean that the sufficiency of training would be measured by the Policy Statement. The Commission, of course, can always take action against a licensee under its general power to insure that powerplants are safely operated, but the Policy Statement adds nothing to the Commission's arsenal of enforcement powers; since the Policy Statement is not an enforceable rule, the Commission, in any enforcement action, would be obliged to support its policy by reference to other authorities just as if the Policy Statement did not exist. *See Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974). Therefore, while it may well be that most or even all licensees comply with the Policy Statement voluntarily, to say that compliance is a requirement is to mock the word "requirement."

The Commission might perhaps be arguing that its whole process of issuing the Policy Statement, monitoring industry's compliance, and imposing enforceable

conditions on licensees that do not comply, amounts to establishing requirements within the meaning of §306. That is, the Commission might be saying that it can establish requirements by a continuing process that includes case-by-case impositions of requirements on particular licensees. If this is what the Commission is saying, however, it will not do. Normally, to be sure, an agency has considerable discretion to establish norms by adjudication rather than by rulemaking. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Section 306, however, directs the Commission to "promulgate" its regulations or regulatory guidance, which immediately suggests rulemaking rather than adjudication, and goes on to say that the regulations or guidance must be promulgated "within the 12-month period following" January 7, 1983. This deadline is clearly inconsistent with a policy of establishing requirements by a process of case-by-case adjudication. The thing the Commission promulgates must itself establish requirements. This the Policy Statement fails to do.

Finally, the Commission and the intervenor argue that the Commission's imposition of mandatory requirements will make the nuclear power industry *less* safe, because it will choke off the industry's self-regulatory efforts; licensees will regard the Commission's requirements as a maximum rather than a minimum level of appropriate training. Whatever we thought of the merits of this argument, we would have no authority to disregard the means that Congress has chosen to achieve its objective of improved training. The Commission and the industry must take this argument to the Congress, not to the courts.

IV. CONCLUSION

We believe the language and history of §306 clearly support the petitioners' claim that the Commission's actions have not satisfied its obligations under that section. We hold, under *Chevron* step one, that the intent of Congress in passing §306 is clear, and that the Commission must follow it. Because Congress directed the NRC to create mandatory requirements for civilian nuclear powerplant licensee personnel training programs, and because the Commission has failed to do so, we remand the case to the Commission for further proceedings consistent with this opinion.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-1017 September Term, 1989

PUBLIC CITIZEN, *et al.*,
PETITIONERS,

v.

NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
RESPONDENTS.

[Filed June 15, 1990]

Before: WALD, *Chief Judge,* and MIKVA and EDWARDS, *Circuit Judges.*

O R D E R

Upon consideration of the petitions for rehearing of the respondent Commission and intervenor it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

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Before: WALD, *Chief Judge,* and MIKVA, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE and THOMAS, *Circuit Judges.*

ORDER

The Suggestions For Rehearing *En Banc* of the respondent Commission and intervenor have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc,* that the suggestions are denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: /s/
Robert A. Bonner
Deputy Clerk

Circuit Judge Ruth B. GINSBURG did not participate in this matter.

WILLIAMS, *Circuit Judge*, joined by SILBERMAN, D.H. GINSBURG and SENTELLE, *Circuit Judges*, concurring in the denial of the suggestions for rehearing *en banc*. The Court here takes a statute directing the Commission to "promulgate regulations [, or other appropriate Commission regulatory guidance]" for various purposes, and produces something quite different, completely shorn of the bracketed language. I would call for rehearing *en banc*, but the statute appears unique and, perhaps more important, it seems to me not beyond the reach of agency expertise to devise "regulations" that preserve most if not all of the flexibility the Commission sought and, correctly I think, believes lawful. Certainly other agencies have done so. See e.g., *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337 (1952).

COMMISSION POLICY STATEMENT ON TRAINING AND QUALIFICATION OF NUCLEAR POWER PLANT PERSONNEL

AGENCY: Nuclear Regulatory Commission
ACTION: Policy Statement

SUMMARY: This statement presents the policy of the Nuclear Regulatory Commission (NRC) with respect to training and personnel qualification and describes the activities that the NRC will use to execute its responsibilities to ensure the health and safety of the public. This Policy Statement provides regulatory guidance called for by the Nuclear Waste Policy Act (Pub. L. 97-425) which directed the NRC to promulgate regulations or other regulatory guidance for the training and qualifications of civilian nuclear power plant operator [sic], supervisors, technicians and other appropriate operating personnel. In recognition of industry initiatives underway to upgrade training programs, the NRC endorses the Institute of Nuclear Power Operations (INPO)-managed Training Accreditation Program in that it encompasses the elements of performance-based training and will provide the basis to ensure that personnel have qualifications commensurate with the performance requirements of their jobs. It remains the continuing responsibility of the NRC to independently evaluate applicant's [sic] and licensees' implementation of improvement programs to ensure that desired results are achieved. Nothing in this Policy Statement shall limit the authority or responsibility of the NRC to follow up on operational events or place any limit on NRC's enforcement authority when regulatory requirements are not met. However, while evaluating the effectiveness of this guidance in lieu of a new training regulation, the NRC intends to exercise some discretion in enforcement matters related to training and qualification of nuclear

plant personnel and refrain from new rulemaking in this area for a period of at least two years from the effective date of this Policy Statement.

EFFECTIVE DATE: March 20, 1985.

FOR FURTHER INFORMATION CONTACT: William T. Russell, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, telephone (301) 492-4803.

SUPPLEMENTARY INFORMATION:

Background

The Nuclear Waste Policy Act (42 USC 10101 et seq.), section 306, directed the Nuclear Regulatory Commission (NRC) to promulgate regulations or other regulatory guidance for the training and qualifications of civilian nuclear power plant operators, supervisors, technicians and other appropriate operating personnel. This Policy Statement is responsive to the mandate of the Nuclear Waste Policy Act for regulatory guidance on training and qualifications for nuclear power plant personnel. Regulations or regulatory guidance in the remaining areas are being developed separately.

Following the accident at TMI-2, the NRC has emphasized the need to upgrade training and qualifications of nuclear power plant personnel. In the TMI Action Plan, NUREG-0660, 1980, the NRC cited its ongoing study of accreditation of training programs in the industry as a possible means of upgrading training. Since that time, the Institute of Nuclear Power Operations (INPO) has developed a training accreditation program which the NRC has found to be an acceptable means of industry self-improvement in training. The NRC has, therefore, made INPO accreditation the focus of the policy set forth here for training, allowing the

industry a minimum of two years of accreditation activity without the introduction of new NRC training regulations.

The following statement sets forth the policy of the NRC with respect to training and qualification and describes the activities that the NRC will use to execute its responsibilities to ensure the health and safety of the public.

Policy Statement

The Commission recognizes that the industry, through the initiatives of the Nuclear Utility Management and Human Resources Committee (NUMARC) and the Institute of Nuclear Power Operations (INPO), has made progress in developing programs to improve nuclear utility training and personnel qualification. While some of these efforts have only recently been initiated, the Commission realizes the importance of industry's initiative and wishes to encourage further self-improvement. Subject to the continued success of INPO programs and NRC's ability to monitor their effectiveness, the Commission will refrain from new rulemaking in the area of training for a minimum period of two years from the effective date of this Policy Statement. While the Commission is deferring rulemaking in this area in recognition of the industry efforts to date, the NRC can only exercise this flexibility as long as the industry programs produce the desired results. It remains the continuing responsibility of the NRC to independently evaluate applicants' and licensees' implementation of improvement programs to ensure these results are achieved and to evaluate the possible need for further NRC action based on the success of industry programs after a two-year period.

The following paragraphs present the NRC policy with respect to licensees' and applicants' programs for personnel training and qualifications.

The nuclear power industry, through programs being coordinated by INPO, has made and is making progress toward improving the training of nuclear power plant personnel by accreditation of training programs. The NRC endorses the INPO-managed Training Accreditation Program in that it encompasses the elements of effective performance-based training.

The NRC considers the following five elements as essential to acceptable training programs:

- Systematic analysis of the jobs to be performed.
- Learning objectives derived from the analysis which describe desired performance after training.
- Training design and implementation based on the learning objectives.
- Evaluation of trainee mastery of the objectives during training.
- Evaluation and revision of the training based on the performance of trained personnel in the job setting.

The NRC recognizes that the INPO-managed accreditation of utility training includes the following training programs:

- Non-licensed operator.
- Control room operator.
- Senior control room operator/shift supervisor.
- Shift technical advisor.
- Instrument and control technician.
- Electrical maintenance personnel.
- Mechanical maintenance personnel.
- Radiological protection technician.

- Chemistry technicians.

- On-site technical staff and managers.

All utilities have committed to achieving accreditation of each of the above training programs. It is understood that each licensee will exert best efforts to have all such programs ready for accreditation (i.e., final self-evaluation report submitted to INPO) by the end of 1986. It is also understood that applicants for operating licenses will exert best efforts to have all such programs ready for accreditation within two years after issuance of a full-power operating license.

For operating reactors, accreditation of the above training programs constitutes a method acceptable to the NRC for implementing performance-based training. The NRC will continue to review and approve all applicant training programs in accordance with applicable regulations, regulatory guidance, and the Standard Review Plan and to conduct inspections necessary to determine that current regulations and license training commitments are being met. Notwithstanding this Policy guidance, regulations in 10 CFR Part 55 regarding licensed operators will continue to be the basis for evaluation of applications for operators' licenses.

It should be noted that training programs for which regulations are currently in place (e.g., fire brigade, emergency response, security) or which are not subject to INPO accreditation (e.g., quality assurance) are not affected by this Policy Statement.

To assure that the nuclear industry's training program improvements are effective, the NRC will continue to closely monitor the process and its results by the following:

- Recommending a member to serve on each Accrediting Board;

- Having an NRC staff member attend and observe Accrediting Board meetings with the INPO staff and/or the utility representatives;

- Periodically observing accreditation team site visits;

- Accompanying INPO on selected plant evaluations;

- Meeting with INPO to share information on projects and activities;

- Reviewing pertinent accreditation documents;

- Including a training summary evaluation as part of each systematic assessment report of licensee performance (SALP);

- Monitoring plant and industry trends and events that involve personnel errors;

- Conducting operator licensing exams;

- Conducting operator requalification exams, consistent with Commission policy;

- Continuing evaluation of industrywide training qualification program effectiveness; and

- Conducting performance-oriented training inspections to assess the level of knowledge of plant personnel.

In addition, INPO will:

- Continue to manage the industry accreditation program;

- Continue to conduct performance-oriented evaluations of training and qualification programs;

- Make generic accreditation documents (program description and criteria) publicly available; and

- Review and consider NRC recommendations regarding training.

Also, the industry, through NUMARC or other appropriate methods, will:

- Brief the Commission periodically on program status; and

- Provide periodic status reports to the NRC staff including plant accreditation status.

Personnel Qualifications

The NRC and industry recognize that the qualifications of personnel at nuclear power plants should be commensurate with the requirements of the jobs they perform. Since the INPO managed accreditation and evaluation programs are performance-based, this policy statement assumes that training programs for those positions covered will provide appropriately qualified personnel. For positions outside the scope of the INPO-managed accreditation program, for licensed operators and senior operators, and for all personnel at facilities applying for an operating license, NRC staff will continue to review qualifications in accordance with appropriate regulatory policy guidance.

NRC will use the same general methods described above for training to monitor the industry's progress in improving the qualifications of nuclear power plant personnel.

Enforcement Policy

Notwithstanding its Enforcement Policy in 10 CFR Part 2, Appendix C, 49 FR 8583 (March 8, 1984), the Commission will exercise some discretion in selecting

appropriate enforcement action for violations involving training in light of the NUMARC/INPO initiative. Licensees who are making reasonable efforts in developing and implementing the INPO/NUMARC programs described above will generally not be cited for violations related to these programs, provided the violations, whether or not identified by NRC, are appropriately corrected in a timely manner. However, violations which are not corrected in a timely manner, violations of any applicable reporting requirement, and any willful violation may be subject to enforcement. Any enforcement action taken during this grace period will be taken only with Commission concurrence. In addition to required reports and inspections, information requests under 10 CFR 50.54(f) may be made and enforcement meetings held to ensure understanding of corrective actions. Orders may be issued where necessary to achieve corrective actions on matters affecting plant safety. In brief, the NRC's decision to use discretion in enforcement in order to recognize industry initiatives in no way changes the NRC's ability to issue orders, call enforcement meetings or suspend licenses when a safety problem is found. Nothing in this Policy Statement shall limit the authority of the NRC to conduct inspections as deemed necessary and to take appropriate enforcement action when regulatory requirements are not met.

Dated at Washington, DC this 14th day of March 1985.
For the Nuclear Regulatory Commission.
John C. Hoyle,
Assistant Secretary of the Commission.

COMMISSION POLICY STATEMENT ON TRAINING AND QUALIFICATION OF NUCLEAR POWER PLANT PERSONNEL

AGENCY: Nuclear Regulatory Commission
ACTION: Amended Policy Statement

SUMMARY: On March 20, 1985, the Nuclear Regulatory Commission (NRC) published a "Commission Policy Statement on Training and Qualifications of Nuclear Power Plant Personnel" (50 FR 11147). The policy statement provided guidance for the training and qualification of nuclear power plant personnel, communicated that NRC would refrain from new training regulation during an evaluation period of two years, and endorsed the Training Accreditation Program managed by the Institute of Nuclear Power Operations (INPO). The NRC monitored industry initiatives to upgrade training programs through the INPO-managed Training Accreditation Program for a two year period. The staff's evaluation of this program indicates that it is generally an effective program for ensuring that nuclear power plant personnel have qualifications commensurate with the performance requirements of their jobs. This statement amends the Commission's policy statement that was published on March 20, 1985 regarding the training and qualification of nuclear power plant personnel.

It remains the continuing responsibility of the NRC to independently evaluate applicants' and licensees' implementation of improvement programs to ensure that desired results are achieved. Nothing in this policy statement shall limit the authority or responsibility of the NRC to follow up on operational events or place any limit on NRC's enforcement authority when regulatory requirements are not met.

The amendments are (1) the addition of information regarding the NRC's experience with industry accreditation, (2) a change in the enforcement section to normalize inspection and enforcement in the areas covered by the policy statement, and (3) minor changes to conform to the current status of Commission and industry guidance.

DATE: The amendments to the policy statement are effective November 18, 1988.

FOR FURTHER INFORMATION CONTACT: Jack W. Roe, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 492-1004.

SUPPLEMENTARY INFORMATION:

Background

The Nuclear Waste Policy Act (Pub. L. 97-425), section 306, directed the Nuclear Regulatory Commission (NRC) to promulgate regulations or other regulatory guidance for the training and qualifications of civilian nuclear power plant operators, supervisors, technicians and other appropriate operating personnel (including instructional requirements, simulator training requirements, and requirements for requalification examinations and operating tests). On March 20, 1985, the NRC published a policy statement which is responsive to the mandate of the Nuclear Waste Policy Act for regulatory guidance on training and qualifications of nuclear power plant personnel. Regulations or regulatory guidance in the remaining areas have been developed separately as a revision to 10 CFR Part 55 — Operators' Licenses.

Following the accident at Three Mile Island, Unit 2 (TMI-2), the NRC continually emphasized the need to upgrade training and qualifications of nuclear power plant personnel. In the "NRC Action Plan Developed as

a Result of the TMI-2 Accident" (NUREG-0660 July 1980),[1] the NRC cited its ongoing study of accreditation of training as a possible means of upgrading training programs in the industry. Since that time, the Institute of Nuclear Power Operations (INPO), with its associated National Academy for Nuclear Training (Academy), has developed a training accreditation program which the NRC has found to be an acceptable means of self-improvement in training. On March 20, 1985, the NRC published the Commission Policy Statement on Training and Qualification of Nuclear Power Plant Personnel,[2] allowing the industry a minimum of two years of accreditation activity without the introduction of new NRC training regulations. The two-year evaluation period ended March 20, 1987.

The staff evaluated the results of the INPO accreditation program between March 1985 and March 1987. The staff's evaluation consisted of participating as observers when utilities' training programs were under evaluation by an INPO accreditation team, observing accrediting board activities, and site inspections as described in SECY-85-201.[3] The staff also developed cri-

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1. Copies of NUREG-0660 may be purchased through the U.S. Government Printing Office by calling (202) 275-2060 or by writing to the U.S. Government Printing Office, P.O. Box 37062, Washington, DC 20013-7062. Copies may also be purchased from the National Technical Information Service, U.S. Department of Commerce, 5258 Port Royal Road, Springfield, VA 22161. A copy is available for inspection and/or copying for a fee in the NRC Public Document Room, 2120 L Street NW, Washington, DC.

2. Commission Policy Statement on Training and Qualification of Nuclear Power Plant Personnel (50 FR 11147; March 20, 1985).

3. Copies of NUREG-1220, SECY-85-201, SECY-86-119, and SECY-87-121 may be purchased through the U.S. Government Printing Office by calling (202) 275-2060 or by writing to the U.S. Government Printing Office, P.O. Box 37062, Washington, DC 20013-7062. Copies may also be purchased from the National Technical Information Service, U.S. Department of Commerce,

teria and procedures that were used to assess whether accredited utility training programs include five critical elements. The review criteria have been published as "Training Review Criteria and Procedures" (NUREG-1220).[4] The criteria were applied by the staff in auditing training programs at eight utilities with accredited training programs. The results of these post-accreditation reviews are included in the "Annual Status Report on Implementation of the Commission Policy Statement on Training and Qualification" (SECY-86-119)[5] and "The 2-Year Evaluation on Implementation of the Commission Policy Statement on Training and Qualification," (SECY-87-121)[6] which provided the findings from the evaluations of the INPO-managed Training Accreditation Program over the two-year evaluation period.

Based on the staff's evaluation of the INPO training accreditation program, the NRC concludes that the program is effective in ensuring that personnel have qualifications commensurate with the performance requirements of their jobs. However, the Commission has determined that the policy statement should be amended to reflect the minor modifications made by the National Academy for Nuclear Training to its accreditation program and the NRC staff to the methods by which it monitors the industry training program. In addition, the Commission has determined that the industry has had sufficient time to establish the accreditation program and it is no longer necessary to exercise extra discretion in enforcement when regulatory requirements are not met. Accordingly, the policy statement is amended to eliminate the extra discretion currently

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FOOTNOTE—*(Continued)*

5258 Port Royal Road, Springfield, VA 22161. Copies are available for inspections and/or copying for a fee in the NRC Public Document Room, 2120 L Street NW, Washington, DC.

4. [See footnote 3.]
5. [See footnote 3.]
6. [See footnote 3.]

provided in the policy statement and to normalize inspections and enforcement actions in the areas covered by the policy statement.

The following sets forth the amendments to the policy of the NRC with respect to training and qualification of nuclear power plant personnel.

Amendments to Policy Statement

(1) The Commission recognizes that the National Academy for Nuclear Training has expanded its accreditation program by establishing an eleventh program for continuing training of licensed personnel.

(2) The NRC staff will expand the methods by which it monitors the industry's training program and its results by performing post-accreditation reviews at selected sites.

(3) The section of the 1985 policy statement entitled "Enforcement Policy" is withdrawn. The NRC will conduct inspections as deemed necessary and take appropriate enforcement action in accordance with the Commission's enforcement policy in 10 CFR Part 2, Appendix C, when regulatory requirements are not met.

Dated at Rockville, MD, this 14th day of November 1988.

No. 90-360 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC., PETITIONER

v.

PUBLIC CITIZEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the legality of a Nuclear Regulatory Commission policy statement may be challenged in court years after the statement's promulgation because the agency has issued minor amendments to the statement.

2. Whether the court of appeals should have deferred to the Commission's interpretation of Section 306 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10226, as permitting the promulgation of policy guidance, rather than formal rules, regarding the training of power plant personnel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 901 F.2d 147. The orders of the court of appeals denying petitions for rehearing and suggestions for rehearing en banc (Pet. App. 24a, 25a-26a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 1990. Petitions for rehearing were denied on June 15, 1990 (Pet. App. 24a). The petition for a writ of certiorari was filed on August 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 306 of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10226, provides that the Nuclear Regulatory Commission "is authorized and directed to promulgate regulations, or other appropriate Commission regulatory guidance" concerning the training and qualifications of civilian nuclear power-plant operating personnel, and that such regulations or guidance shall establish "instructional requirements" for the personnel training programs of civilian nuclear power plant licensees.

To implement Section 306, the Commission in 1985 issued a policy statement providing regulatory guidance for the training and qualifications of nuclear power plant personnel. 50 Fed. Reg. 11,147 (1985); Pet. App. 27a-34a. In its policy statement, the Commission announced that "regulatory guidance" satisfied "the mandate of the Nuclear Waste Policy Act," and that it was "deferring rulemaking" on training and qualifications for a minimum of two years to afford the nuclear utility industry an opportunity to achieve the goals of Section 306 without regulations (Pet. App. 28a-29a). The policy statement endorsed the training accreditation program developed by the Institute of Nuclear Power Operations (INPO), an industry group established to assist utilities in improving the quality of the management and operation of their nuclear facilities (Pet. App. 29a, 30a). In addition, the NRC stated that it would continue to evaluate the utilities' implementation of the program, and identified a number of specific actions that it would take to monitor the accreditation program developed by INPO in order to determine whether further agency action would be appropriate (Pet. App. 31a-32a).

2. More than a year after the promulgation of this policy statement, respondent Public Citizen requested the Commission to "immediately undertake rulemaking [in order] to comply with * * * Section 306 of the Nuclear Waste Policy Act of 1982." 51 Fed. Reg. 17,361 (1986). Without waiting for the agency to rule on the request for rulemaking, Public Citizen filed suit against the NRC. In that suit, the court of appeals ruled that Public Citizen's challenge to the 1985 policy statement was too late under either of the potentially applicable jurisdictional statutes: it was not filed within either the 180-day time limit of the Nuclear Waste Policy Act of 1982, 42 U.S.C. 10139(c), or the 60-day limit of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2342(4). Alternatively, the court held that if the suit were deemed a challenge to the Commission's rejection of Public Citizen's petition for rulemaking, it was too early. Accordingly, the case was dismissed. *Public Citizen* v. *NRC*, 845 F.2d 1105 (D.C. Cir. 1988).

On February 2, 1987, the Commission unanimously denied the petition for rulemaking. 52 Fed. Reg. 3121 (1987). The Commission explained that it had determined "that 'guidance' or 'regulatory guidance' do[es] not necessarily mean a mandatory, enforceable regulation, order or license condition." *Id.* at 3125. Public Citizen did not seek judicial review of this denial.

3. In 1988, the Commission issued minor amendments to its policy statement (Pet. App. 35a-39a).[1]

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[1] The 1988 amendments made three changes in the policy statement: (1) NRC monitoring and review were expanded; (2) the enforcement discretion included in the 1985 policy statement was eliminated; and (3) minor modifications made by the National Academy for Nuclear Training to its ac-

In January 1989, respondents brought this suit against the Commission, again asserting that the Commission had failed to comply with Section 306 by refusing to impose regulations for the training of nuclear power plant personnel. This time, the court of appeals held that the Commission's decision in 1988 to issue amendments to its policy statement and to keep the policy statement in force started anew the time for judicial review, on the theory that the 1988 decision implicitly "raise[d] the lawfulness" of the original determination to issue a policy statement (Pet. App. 9a).

On the merits, the court of appeals concluded that the issuance of the 1985 policy statement did not satisfy the Commission's obligations under Section 306. The court acknowledged that the statute allowed the NRC "to promulgate regulations, *or* other appropriate Commission regulatory guidance." 42 U.S.C. 10226 (emphasis added). The court concluded, however, that other portions of the statute, particularly the direction to "establish . . . instructional requirements," showed that Congress wanted the Commission to issue binding rules (Pet. App. 12a-22a). The court also held (Pet. App. 13a, 23a) that the statute was so clear that it precluded consideration of the agency's contrary view, citing *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). The court accordingly ordered the agency "to create mandatory requirements" (Pet. App. 23a).

4. The court of appeals denied petitions for re-

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creditation program were incorporated. The statement accompanying the 1988 amendments reflected the Commission's conclusion "that the [INPO training accreditation] program is effective in ensuring that personnel have qualifications commensurate with the performance requirements of their jobs" (Pet. App. 38a, 39a).

hearing and suggestions for rehearing en banc filed by the Commission and by petitioner, the intervenor below. Pet. App. 24a-26a. Judge Williams, joined by Judges Silberman, D. H. Ginsburg, and Sentelle, concurred in the denial of the suggestions for rehearing en banc, but specifically disagreed with the panel's decision on the merits. He stated that the decision had "completely shorn" Section 306 of its disjunctive statutory language directing issuance of regulations *or* regulatory guidance. Pet. App. 26a. He explained that he did not call for rehearing en banc because "the statute appears unique" and "perhaps more important, it seems * * * not beyond the reach of agency expertise to devise 'regulations' that preserve most if not all of the flexibility the Commission sought and, correctly * * *, believes lawful." *Ibid.*

DISCUSSION

We agree with petitioner that the court of appeals' view of its power to consider a challenge to a four-year old NRC policy statement is incorrect, and defeated reasonable expectations of stability in this regulatory process. We also fully endorse petitioner's argument that the decision below incorrectly interpreted Section 306, and misconstrued *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. at 843, by failing to give deference to a reasonable statutory construction by the agency to which Congress has delegated the responsibility for administering this statute. The federal respondents did not file their own petition because the Commission expects to follow Judge Williams' suggestion and "devise 'regulations' that preserve most if not all of the flexibility" the Commission sought in its policy statement. Pet. App. 26a. The fact remains, however, that the court of appeals

has erroneously required the NRC to intrude on a highly effective, industry-developed program by promulgating binding regulations that the Commission believes are neither necessary as a matter of policy nor required by law. Therefore, the federal respondents do not oppose certiorari.

1. The court of appeals' determination that it had subject matter jurisdiction in this case was incorrect. The court of appeals itself has held repeatedly that, with rare exceptions, an attack on the validity of agency action must be made within the statutory review period. See, *e.g.*, *Massachusetts* v. *ICC*, 893 F.2d 1368 (D.C. Cir. 1990); *American Iron & Steel Inst.* v. *EPA*, 886 F.2d 390 (D.C. Cir. 1989); *Raton Gas Transmission Co.* v. *FERC*, 852 F.2d 612 (D.C. Cir. 1988); *National Rifle Ass'n* v. *Federal Election Comm'n*, 854 F.2d 1330 (D.C. Cir. 1988). Here, the statutory review period for a complaint alleging that the NRC failed to implement Section 306 is established by one of two potentially applicable jurisdictional statutes: the Nuclear Waste Policy Act of 1982, which contains a 180-day time limit (42 U.S.C. 10139(c)), or the Hobbs Administrative Orders Review Act, which contains a 60-day limit (28 U.S.C. 2342(4)). Both of those time limits had long since expired when the complaint in this case was filed. *Public Citizen* v. *NRC*, 845 F.2d 1105 (D.C. Cir. 1988).

To overcome this obstacle, the court of appeals found that "the Commission's 1985 action represented a temporary decision not to engage in rulemaking on mandatory training standards, and that the 1988 action reexamined this choice and made it permanent" (Pet. App. 7a). This was an incorrect reading of the Commission's action. In March 1985, in direct response to a congressional directive to issue regula-

tions or regulatory guidance implementing Section 306, the NRC adopted the policy statement attacked below. The court of appeals previously found that announcement sufficiently definitive and final to trigger the running of the limitations period. *Public Citizen* v. *NRC*, 845 F.2d at 1108. In our view, the court was correct in its first decision, rather than its second.

Nor did the agency reopen the basic issue in 1988. At that time, the NRC simply issued three minor amendments to its 1985 policy statement (see note 1, *supra*). While the NRC did, at the same time, observe that its original regulatory choice had proved effective, it did not even obliquely reconsider the policy statement's lawfulness. The court of appeals has chosen to disbelieve the agency and to read far more into the agency's statements than is there.[2]

2. The court of appeals' decision on the merits is also incorrect. It runs counter to established doctrines of statutory construction and principles governing judicial review of an agency's interpretation

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[2] The court relied on agencies' "everpresent duty to insure that their actions are lawful" (Pet. App. 9a). But if this duty suffices to permit challenges to established policies, it would eliminate statutory review periods altogether. The court also suggested in passing (*ibid.*) that a claim challenging agency action as violative of a statute may be raised after a statutory limitations period has expired by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition in court. Whether or not this avenue for avoiding limitations periods is available to litigants, respondent Public Citizen filed just such a petition with the NRC in 1986, but did not seek timely judicial review of its denial. *Public Citizen* v. *NRC*, 845 F.2d 1105 (D.C. Cir. 1988). The court of appeals did not explain why Public Citizen should have a second chance.

of its statutory mandates. The court read Section 306 to require the Commission to promulgate regulations (Pet. App. 22a). But the operative words of the statutory provision direct the Commission "to promulgate regulations, *or* other appropriate Commission regulatory guidance" (42 U.S.C. 10226 (emphasis added)). This disjunctive phrasing indicates clearly that Congress contemplated alternative approaches, and authorized the Commission to adopt an approach other than issuing regulations. The court of appeals' interpretation—by mandating binding rules—makes the phrase "other appropriate Commission regulatory *guidance*" entirely meaningless.[3] (Emphasis added.) This is contrary to the two well-established principles of statutory construction that (1) statutory language must be held to mean what it plainly expresses (the so-called "plain meaning" rule), and (2) all of the language of a statute must be given effect. See 2A N. Singer, *Sutherland Statutory Construction* §§ 46.01, 46.06 (Sands 4th ed. Supp. 1990).

It is true, as the court of appeals stressed, that Section 306 says that the "regulations" or "regulatory guidance" must "establish * * * instructional requirements," but the court was wrong in concluding that the Commission's "guidance" approach is incompatible with the "requirements" directive. In fact, the policy statement does establish "requirements": it sets forth "essential elements" for an acceptable training pro-

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[3] The court of appeals rejected any interpretation of Section 306 that would permit the NRC to take any action—such as the case-by-case imposition of requirements on particular licensees—short of the issuance of regulations (Pet. App. 22a).

gram.[4] The statement is backed by vigorous Commission oversight of licensee activities and an enforcement policy leading to enforceable orders or license conditions where training or qualifications deficiencies exist. In light of the relationship between the Commission and the regulated industry, this scheme certainly creates "requirements" in any practical sense. Indeed, the court of appeals itself in a previous case characterized similar guidance in a regulatory agency's policy statement as "requirements." *Guardian Fed. Sav. & Loan Ass'n* v. *FSLIC*, 589 F.2d 658, 667 (D.C. Cir. 1978).

The court of appeals' decision entirely ignores the Commission's frequent and longstanding practice of issuing "[r]egulatory [g]uides," not binding in themselves, to the nuclear industry. See *Porter County Chapter of the Isaac Walton League* v. *AEC*, 533 F.2d 1011, 1016 n.5 (7th Cir.), cert. denied, 429 U.S. 945 (1976). It is difficult to believe that Congress would not have stated that non-binding guidance was impermissible under Section 306, if Congress desired to eliminate it as a possible method of implementing the statute.[5] Instead, as we have

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[4] The instructional requirements listed in the statement are as follows (Pet. App. 30a):

- Systematic analysis of the jobs to be performed.
- Learning objectives derived from the analysis which describe desired performance after training.
- Training design and implementation based on the learning objectives.
- Evaluation of trainee mastery of the objectives during training.
- Evaluation and revision of the training based on the performance of trained personnel in the job setting.

[5] The court of appeals found support for its view of Section 306 in other statutes requiring agencies to "establish require-

stressed, Congress expressly provided that the NRC could issue "guidance" as an alternative to regulations.

At bottom, the court of appeals imposed its preferred reading of Section 306 on the NRC. Indeed, the court virtually acknowledged as much. It recognized that " 'guidance' certainly can mean, in ordinary parlance, to give advice, or suggestions" (Pet. App. 14a), but viewed the term "requirements" as "clearer" (Pet. App. 16a). This approach to statutory construction is fundamentally at odds with the deference doctrine this Court recognized in *Chevron* —which requires courts to resolve ambiguities in the agency's favor, not to engage in their own *de novo* examination of the statute, so long as the agency's statutory reading is a "permissible" one. 467 U.S. at 843. Accord, *Fort Stewart Schools* v. *FLRA*, 110 S. Ct. 2043, 2046 (1990); *K-Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 292 (1988). In this case, whatever the merits of the court of appeals' own reading of Section 306, the NRC's contrary reading is, at the least, a "permissible" one.

3. The court of appeals' decision intrudes on a successful training program that has been the subject of lengthy, in-depth deliberation and review by the NRC and the expenditure of considerable resources by the utility industry. Pet. 13 & n.6. In issuing its 1985 policy statement, the Commission de-

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ments" (Pet. App. 16a-17a). This Court has recently criticized this method of statutory construction: *Tafflin* v. *Levitt*, 110 S. Ct. 792, 797 (1990), explaining that the "mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language" (quoting *Lou* v. *Belzberg*, 834 F.2d 730, 737 (9th Cir. 1987)).

liberately chose to issue policy guidance rather than regulations because the nuclear industry had "developed a training accreditation program which the NRC has found to be an acceptable means of industry self-improvement in training" (Pet. App. 28a). In amending the policy statement in 1988, the Commission found that the industry program "is generally an effective program for ensuring that nuclear power plant personnel have qualifications commensurate with the performance requirements of their jobs" (Pet. App. 35a). The NRC remains firmly of the view that the industry accreditation program has been a success and does not warrant direct supervision through NRC regulations.

Nonetheless, although in our view the court of appeals has misread the law, forcing the NRC to devote scarce resources to an area where an existing program is working well, we have not filed our own petition for a writ of certiorari. The agency currently is studying ways to issue regulations on employee training that would disrupt the successful industry initiative to the minimum degree possible, and is hopeful that it will be able to comply with the court's mandate while still preserving most of the policy statement's flexibility. For this reason, the federal respondents have not themselves sought review in this Court. Nevertheless, for the reasons we have outlined, we do not oppose the granting of the instant petition. If the petition is granted, we will participate in the case in support of petitioner.

CONCLUSION

The federal respondents do not oppose the petition for a writ of certiorari.

Respectfully submitted.

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OCTOBER 1990

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* The Solicitor General is disqualified in this case.

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No. 90-360

In The

Supreme Court of the United States

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Petitioner,

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PUBLIC CITIZEN, *et al.*

Respondents.

On Petition For A Writ Of Certiorari
To The District Of Columbia Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November 5, 1990

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QUESTIONS PRESENTED

1. Was the court of appeals correct in concluding that the Nuclear Regulatory Commission's decision not to impose binding training requirements for nuclear power-plant personnel violated § 306 of the Nuclear Waste Policy Act of 1982, which directs the agency to "establish . . . instructional requirements"?

2. Was the court of appeals correct in concluding that the Nuclear Regulatory Commission's decision to make permanent its two year trial policy of implementing § 306 by deferring to an industry training program, instead of issuing binding requirements, was subject to judicial review?

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Petitioner,

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Respondents.

On Petition for a Writ of Certiorari To the District of Columbia Circuit

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MEMORANDUM FOR THE PUBLIC CITIZEN RESPONDENTS IN OPPOSITION

Respondents Public Citizen, Nuclear Energy Information Service, Center for Nuclear Responsibility, Del-Aware Unlimited, Inc., Three Mile Island Alert, Coalition for the Environment, and Cuyahoga County Concerned Citizens ("Public Citizen") hereby oppose the petition for certiorari filed by Nuclear Management and Resources Council, Inc. ("NUMARC").

STATEMENT

1. Following the accident at the Three Mile Island nuclear plant in 1979, a Presidential Commission reported that the lack of adequate training for power-plant operators contributed

significantly to the risks posed by nuclear power-plants. *See* Pet. App. 2a. The industry responded to the accident by creating a program of self-regulation, which focused on improving the training and qualifications of nuclear power-plant personnel.

Congress, however, was not content to trust industry to solve the training problems on its own. Thus, in 1983, Congress enacted § 306 of the Nuclear Waste Policy Act, 42 U.S.C. 10226, which directed the respondent Nuclear Regulatory Commission ("NRC") to "promulgate regulations, or other appropriate Commission regulatory guidance" within 12 months, in order to "establish . . . instructional requirements for civilian nuclear powerplant licensee personnel training programs."

In 1985, the NRC issued a Policy Statement purporting to implement § 306. The Policy Statement announced that, in view of progress being made by the industry's program, the NRC would not engage in rulemaking, but would instead monitor the industry's program for a two-year period and then "revisit the entire training issue . . .." Pet. App. 7a; 52 Fed. Reg. 3124 (February 2, 1987).

Dissatisfied with the NRC's decision to defer to industry for any period of time, respondent Public Citizen petitioned the agency in 1986 to issue binding regulations. When its rulemaking petition went unanswered, Public Citizen filed a petition for mandamus in the United States Court of Appeals for the District of Columbia challenging the NRC's failure to issue binding regulations. Shortly thereafter, the NRC denied Public Citizen's rulemaking petition. The court of appeals then dismissed the lawsuit as having been filed too late to challenge the NRC's 1985 policy statement, but too early to be a petition for review of the denial of Public Citizen's 1986 petition

for rulemaking. *Public Citizen v. NRC*, 845 F.2d 1105 (D.C. Cir. 1988)("*Public Citizen I*").

As promised in its original Policy Statement, the NRC revisited the training issue in 1988. The NRC found that "shortcomings in training are prevalent," SECY-87-121, at 2-3 (May 11, 1987)(J.A. at 69-74), and that "training deficiencies and weaknesses have been identified . . . [in industry] training programs." *Id.* at 4. Nevertheless, the Commission decided to make permanent its policy of deferring to the industry program and not promulgating any requirements on its own. Thus, on November 18, 1988, it again published its Policy Statement, with several refinements. Pet. App. 35a-39a; 53 Fed. Reg. 46603 (1988). From this action, Public Citizen petitioned for review on January 13, 1989, within sixty days of the issuance of the 1988 Policy Statement.

2. The court below first addressed the timeliness of Public Citizen's petition for review, finding that it had been timely filed. The court reasoned that the NRC's 1988 review of its Policy Statement, and its decision to change its temporary policy into a permanent one, constituted a reopening of the issue which made the NRC's 1988 Policy Statement subject to challenge. Pet. App. 4a-12a. Accordingly, because Public Citizen's petition was filed within the 60-day deadline applicable under the Hobbs Act, 28 U.S.C. § 2342(4), and the 180-day time period set forth in the Nuclear Waste Policy Act, 42 U.S.C. § 10139(c), its petition for review was timely, regardless of which provision governed.

The court next addressed the merits of Public Citizen's claim that the Policy Statement conflicted with the mandate of § 306 because it failed to impose enforceable training and qualification requirements. Expressly "[a]pply[ing] the rules laid down in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)," Pet.

App. 13a, the court began its analysis with the language of § 306. It noted that § 306's direction that the NRC "promulgate regulations, or . . . regulatory guidance," did not clearly resolve the question of whether the NRC had to issue enforceable requirements. But the court found that any ambiguity was dispelled by § 306's decree that the regulations or guidance must "establish instructional *requirements* for civilian nuclear powerplant licensee personnel training programs." (emphasis added). This language, the court said, "clearly suggests a mandatory regime." Pet. App. 16a. The court also noted that reading § 306 as imposing a mandatory requirement is in keeping with numerous other statutes, which "instruct an agency to establish requirements, and almost always in the context that makes clear that the requirements must be mandatory." *Id.* Finally, the court found that the legislative history of § 306 supported the conclusion that Congress intended the NRC to establish mandatory requirements for operator training programs. *Id.* at 17a. Having concluded that the NRC's Policy Statement violated § 306 by failing to establish enforceable requirements, the court granted the petition and directed the NRC to issue mandatory requirements for civilian nuclear power-plant licensee personnel training programs. Pet. App. 23a.

3. Both the NRC and NUMARC sought rehearing by the panel, which was denied without dissent. Pet. App. 24a. The NRC and NUMARC also sought rehearing *en banc*, which was also denied without dissent. Judge Williams, joined by Judges Silberman, D.H. Ginsburg, and Sentelle, filed a concurring opinion stating that, although they disagreed with the panel's reading of § 306, the case did not merit *en banc* consideration because "the statute appears unique and, perhaps more important, it seems to me not beyond the reach of agency expertise to devise 'regulations' that preserve most if not all of the flexibility the Commission sought . . .." Pet. App. 26a.

Although Judge Williams had authored *Public Citizen I*, his concurrence did not express any reservations about the panel's ruling on the timeliness question.

REASONS FOR DENYING THE WRIT

This case does not warrant review by this Court for three reasons: *first*, the ruling below will not impede the NRC's ability to implement § 306, *second*, the ruling below is correct, and *third*, the ruling below is not in conflict with any other decision, and will have little, if any, impact on other cases because the language of § 306 appears to be unique to the Nuclear Waste Policy Act.

1. The NRC does not share petitioner's view that this case "presents an issue of fundamental importance to the safety of operations in the nuclear power industry." Pet. at 12. It is the NRC, of course, which is ultimately responsible for overseeing the safety of our nation's civilian nuclear program. But the Commission has not requested certiorari here. While, not surprisingly, the NRC disagrees with the holding below and, for that reason, does not oppose certiorari, it has made the judgment that it can live with the ruling below without an impairment of its regulatory responsibilities. Indeed, the Commission's Brief candidly acknowledges that it fully "expects to follow Judge Williams' suggestion and 'devise "regulations" that preserve most if not all of the flexibility' the Commission sought in its Policy Statement." NRC Brief at 7, *quoting* Pet. App. 26a; *see also id.* at 11. Nor is there even a suggestion in the NRC's brief that this case implicates the safety concerns NUMARC dwells upon in its Petition. Thus, petitioner's policy arguments are, at the least, vastly overstated.

The NRC's admission that it can comply with the court's mandate without sacrificing any of its policy goals is compell-

ed by the limited scope of the relief granted by the court below. That court simply ordered the NRC "to create mandatory requirements for civilian powerplant licensee personnel training programs." Pet. App. 32a. The court did not prescribe the substance of these requirements; that is left to the NRC's discretion. Indeed, nothing in the ruling below forbids the NRC from drawing on NUMARC's expertise in fashioning its requirements, or even adopting the substance of NUMARC's program as its own, so long as it becomes enforceable by the NRC. As Judge Williams pointed out in declining to call for rehearing *en banc*, the panel ruling thus "preserve[s] most if not all of the flexibility the Commission sought . . .." Pet. App. 26a. Because the ruling below will not impede the ability of the NRC to perform its duties under § 306, this case does not warrant this Court's review.

2. In any event, the ruling below properly resolved the two issues in the case. Although petitioner claims that the interpretation of § 306 adopted by the court below disregards the term "regulatory guidance," and violates the rule of deference erected in cases such as *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), both of these assertions miss the mark for the same reason.

The court below expressly and properly concluded that this is a *Chevron* "step one" case because the language of § 306 is unambiguous in its command that the NRC issue mandatory requirements. In reaching its conclusion, the court looked to "the particular language at issue, as well as the language and design of the statute as a whole." Pet. App. 13a, *quoting K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). As the court observed, the introductory phrase in § 306 — which tells the NRC "to promulgate regulations or other appropriate Commission regulatory guidance" — is subject to the directive that such regulations or guidance must "establish . . .

instructional *requirements*." (emphasis added). Pet. App. 16a-17a, 19a-22a. The use of the word "requirements," the court held, clearly indicates a "mandatory regime" and "means something compelled, not merely suggested." Pet. App. 16a. According to the court, this construction of § 306 is in keeping with the statute's overall purpose, as well as clear indications in the legislative history that Congress intended the Commission to issue binding regulations. Pet. App. 16a-18a.

The court's ruling that the word "requirements" compels the NRC to take enforceable action is plainly correct, and is in accord with substantial precedent. *Id.* As the court pointed out, Congress often uses the word requirements in instances where it wishes to make clear that agencies must impose mandatory, enforceable obligations. *Id.* What is more, under the reading of § 306 urged by petitioner and the NRC, the word requirements would be excised altogether from the statute — a result that would be at odds with the fundamental canon of construction cited by the NRC itself (Br. at 8) that, where possible, all statutory language be given effect. In contrast, the assertion advanced by petitioner and the NRC that the ruling below nullifies the word "guidance" is based on a misreading of the court's opinion. Nowhere does the court below forbid the NRC from promulgating "guidance" or "guidelines"; it is free to do so provided that the agency also imposes enforceable requirements for training and qualifications of power-plant personnel.

Nor is there any force to petitioner's arguments concerning the timeliness of Public Citizen's petition for review. Applying well-settled authority to the unusual facts of this case, the court below held that, where an agency reopens a prior rulemaking — here, by deciding to make *permanent* a previously *temporary* policy — challenges to the legality of the agency's action are in order. *See* Pet. App. 5a-9a and authorities

cited therein. Both the petitioner and the NRC take issue with the court's conclusion that the NRC's republication of its Policy Statement in fact entailed a reconsideration of its prior position. But there is no reason why this Court should revisit the court of appeals' resolution of this fact-intensive issue, which is fully supported by numerous NRC statements in the record. Indeed, the court below cites a number of passages in NRC documents establishing that the NRC's 1988 proceeding was intended to be, and was, in fact, a comprehensive reexamination of the choices embodied in the earlier Policy Statement and a decision to transform a temporary, experimental program into a permanent one. Pet. App. 4a-12a. But even if there were room to doubt the soundness of the court of appeals' ruling on this issue, the question of how to properly characterize the NRC's 1988 reopening of its Policy Statement is not one worthy of this Court's consideration.

Equally without merit is petitioner's suggestion, echoed by the NRC, that there is a tension between the panel opinion here and that in *Public Citizen I*. Although both NUMARC and NRC sought rehearing *en banc* on the timeliness issue, Judge Williams did not question the correctness of that aspect of the panel's ruling in his concurrence supporting denial of review *en banc*. Pet. App. 26a. Surely, if there were any force to the argument that the panel's ruling here was in conflict with *Public Citizen I*, Judge Williams — the author of *Public Citizen I* — would have raised it in order to preserve consistency in the court of appeals' jurisprudence. Moreover, even if this argument had merit — which it does not — while "maintaining uniformity" within the Circuit is a principal ground for granting rehearing *en banc*, it is not a reason for this Court to grant review. *Compare* Rule 35(a), Fed.R.App.P. *with* Supreme Court Rule 10. Accordingly, this aspect of the petition also presents no question worthy of this Court's review.

3. Perhaps the most telling flaw in the presentations of petitioner and the NRC on the merits is their failure to come to grips with the uniqueness of this case, which renders it particularly unsuited for review. The main controversy among the parties is the proper construction to be given to § 306. But neither petitioner nor the NRC claims that the ruling below conflicts with any other ruling interpreting § 306. Nor have they taken issue with Judge Williams' observation that the language used in § 306, if not unique, is at least extremely uncommon. Pet. App. 26a. Thus, the question of statutory construction that this Court is urged to resolve will almost certainly not recur. For this reason as well, review should be denied.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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No. 90-360

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

NUCLEAR MANAGEMENT AND RESOURCES COUNCIL, INC.,
Petitioner,

v.

PUBLIC CITIZEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The federal respondents persuasively demonstrate the manifest error committed by the court below. For present purposes, then, the dispositive question is whether that error warrants this Court's immediate attention. In our view, the court of appeals' decision will have such a substantially disruptive effect on the safe operation of nuclear power plants as to justify review at this time.

1. In opposing the petition for a writ of certiorari, Public Citizen argues principally that this case does not warrant review because the NRC "has made the judgment that it can live with the ruling below without an impairment of its regulatory responsibilities." Pub. Cit. Mem. at 5. The NRC itself, however, is not nearly so sanguine. Most notably, the federal respondents do not oppose the grant of certiorari, as they typically do when they consider an issue unimportant. Indeed, far from

"admi[tting] that it can comply with the court's mandate without sacrificing any of its policy goals" (Pub. Cit. Mem. at 5), the NRC has limited itself to the equivocal declaration that it is "hopeful" a regulatory solution may be devised. Fed. Br. at 11. As we discuss below, whether the Commission possibly can accomplish this objective remains problematic.

In any event, regardless of the regulatory regime the NRC ultimately may adopt, the nuclear industry's present training and accreditation program inevitably will suffer disruption in the interim. Under the Commission's close supervision, the ongoing implementation of (and improvement in) training of critical nuclear power plant personnel has largely relied on industry initiative. That initiative necessarily will be blunted by uncertainty about the status of the controlling regulatory program. At the same time, the value of continuing industry expenditures will remain at risk so long as the state of the regulatory regime is unsettled, a circumstance that can only discourage the investment of additional industry resources for expanded safety efforts. The harm caused by disruption and uncertainty is, of course, especially acute when the safe operation of nuclear power plants is at issue. Immediate review of the judgment below therefore is warranted.

2. Even apart from the irreparable damage caused by delay in settling the status of the industry's training and accreditation program, Public Citizen simply disregards the fundamental question whether a satisfactory regulatory substitute for the Policy Statement can be devised.[1] In short, even were it possible to develop man-

[1] Again, the federal respondents themselves expressed no confidence on this point; they indicated only that "[t]he agency currently is studying ways to issue regulations on employee training that would disrupt the successful industry initiative to the minimum degree possible, and is hopeful that it will be able to comply with the court's mandate while still preserving most of the policy statement's flexibility." Fed. Br. at 11.

datory regulations that preserve the requisite flexibility and encourage appropriate industry initiative, it is unclear that such a regime would satisfy the mandate of the court of appeals. The court below indicated, for example, that the Commission is obligated to "prescribe criteria to which training programs must adhere" (Pet. App. at 2a), and to "create mandatory requirements for civilian nuclear powerplant licensee personnel training programs" (Pet. App. 23a). This language indicates that the court may have had in mind the development of a far more detailed and prescriptive regulatory code than did Judge Williams.

In fact, for reasons explained in the petition, *any* prescriptive regulations in the area of personnel training would undermine, if not destroy, the "successful industry initiative" [2] that the NRC, in its expert judgment, approved and for five years has nurtured. *See* Pet. at 4-5, 19-22. Simply stated, any regulatory substitute for the Policy Statement would mark a return to the NRC's pre-Three Mile Island "preoccupation with regulations,"

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[2] In an attempt to discredit the NRC's claims concerning the Policy Statement's success, Public Citizen cites a 1987 NRC staff evaluation of the industry-developed training program which noted that " 'shortcomings in training are prevalent' " and that " 'training deficiencies and weaknesses have been identified.' " Pub. Cit. Mem. at 3 (quoting SECY 87-121, at 2-3, 4 (May 11, 1987)). Actually, the NRC has informed this Court that the industry program is "highly effective" (Fed. Br. at 6) and "successful" (Fed. Br. at 10). Moreover, the 1987 staff evaluation cited by Public Citizen concluded:

> Significant progress is being made by industry in improving training and implementing the Commission's Policy Statement. . . . Deficiencies of the type identified are to be expected given the magnitude of the effort involved and the difficulty in implementing performance-based concepts by an industry that until recently based training on NRC-specific requirements. . . . *On balance, however, the industry's efforts to date to improve training have been successful.*

SECY 87-121, at 4-5 (May 11, 1987) (emphasis added).

which was criticized by the Kemeny Commission Report —the catalyst for Section 306—as "a negative factor in nuclear safety." *See* Pet. at 4. Public health and safety is not a subject where a second-best approach is acceptable.

3. Rather than come to grips with this issue, Public Citizen contends that review is not warranted because the question here is unlikely to recur in other courts. Pub. Cit. Mem. at 9.[3] But while we agree that a conflict in the circuits regarding this issue will not arise, that circumstance demonstrates the necessity of immediate review by the Court. A conflict is not likely to develop because the decision below purports definitively to settle the Commission's obligation to promulgate regulations. Accordingly, absent review by this Court, the court of appeals' ruling will have a permanent, nationwide effect on a program critical to nuclear safety. As we explained in the petition (*see* Pet. at 13 & n.6)—and as Public Citizen does not deny—that decision also will render nugatory the enormous investment in the development of training and accreditation programs undertaken by the nuclear industry in reliance on the NRC's Policy Statement. *See* Fed. Br. at 10. Public Citizen's argument that review is inappropriate in such a case would preclude this Court's consideration of any decision invalidating an

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[3] Public Citizen also contends that review is inappropriate because "the language used in § 306, if not unique, is at least extremely uncommon." Pub. Cit. Mem. at 9. It is unlikely that Public Citizen seriously advances this contention, since its argument on the merits is based, in large part, on an interpretation of similar language in other statutes. *See* Pub. Cit. Mem. at 7. In any event, this Court has made clear that all statutes must be interpreted on their own terms, explaining that the " 'mere borrowing of statutory language does not imply that Congress also intended to incorporate all of the baggage that may be attached to the borrowed language.' " *Tafflin v. Levitt*, 110 S. Ct. 792, 797 (1990) (quoting *Lou v. Belzberg*, 834 F.2d 730, 797 (9th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988)). That understanding has not, of course, been thought to preclude review of decisions interpreting statutes.

agency's regulatory approach under a specialized statute, no matter how important the issue or manifestly erroneous the decision.

4. Finally, the decision below plainly is erroneous. Public Citizen's argument to the contrary rests on two propositions: that "regulatory guidance" cannot "establish . . . instructional requirements"; and that the assertedly unambiguous term "instructional requirements" trumps the purportedly ambiguous term "regulatory guidance." Pub. Cit. Mem. at 6-7. Both of these propositions are incorrect.

As the petition for a writ of certiorari and the brief for the federal respondents demonstrate, regulatory guidance in the form of the Policy Statement can and does establish instructional requirements for the training of nuclear power plant personnel. *See* Pet. at 17 & n.8; Fed. Br. at 8-9. In concluding otherwise and rejecting the NRC's implementation of Section 306, the court below excised the term "regulatory guidance" from the statute [4] and thereby disregarded the maxim that a statute should be construed so as to give effect to *all* of its language.

Even accepting the court of appeals' view as to the relative clarity of the two statutory terms in question,

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[4] Asserting that the court of appeals did not read the term entirely out of Section 306, Public Citizen states: "Nowhere does the court below forbid the NRC from promulgating 'guidance' or 'guidelines'; it is free to do so provided that the agency *also* imposes enforceable requirements for training and qualifications of power-plant personnel." Pub. Cit. Mem. at 7 (emphasis added). Rather than buttress Public Citizen's assertion, however, the statement illustrates vividly the bankruptcy of Public Citizen's and the court of appeals' reasoning. In short, the argument wholly disregards the disjunctive language of Section 306. Moreover, if guidance cannot "establish . . . instructional requirements," the statute's countenance of regulatory guidance would be mere surplusage; even after issuing regulatory guidance, the NRC would have to take further, different action to comply with Section 306. This illogical reading of the statute is avoided by recognizing that regulatory guidance can, indeed, "establish . . . instructional requirements."

that conclusion should not have been used by the court to impose on the NRC and the regulated public its own interpretation of Section 306. As this Court's opinion in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), makes clear, ambiguity in a statute calls for judicial deference to reasonable agency constructions thereof; it is not a license by which the judiciary can oust such interpretations. The decision below, which gives lip service to *Chevron* by the simple expedient of declaring the Commission's interpretation inconsistent with the statutory language, provides a model for evasion of *Chevron*'s mandate which should not be countenanced.

With respect to the second question presented in this case, the timeliness of Public Citizen's 1989 challenge to the NRC's 1985 Policy Statement, Public Citizen is simply incorrect in contending that the decision below was based on a fact-intensive inquiry. The "facts" [5] recounted by Public Citizen and assertedly central to the decision below are without legal significance under the "ever-present duty" test concocted by the court of appeals. Under that test, the most minor adjustment of *any* regulatory program or policy can serve as the basis for renewed judicial review of all decisions connected with that program or policy, no matter how remote from the new

[5] Public Citizen misstates the development and history of the 1985 Policy Statement. The most perfunctory review of the NRC's 1985 and 1988 issuances reveals the following: (1) the Policy Statement was by no means temporary; even in the absence of any further NRC action regarding nuclear power plant personnel training, the Policy Statement would remain effective today; (2) the vitality of the Policy Statement was (and remains) contingent upon practical considerations of its success in contributing to the safety of nuclear power plants, *not* on a renewed determination of its lawfulness; (3) in issuing the three minor amendments to the Policy Statement, the NRC did not republish the Policy Statement or address in any manner its 1985 decision that regulatory guidance in the form of the Policy Statement satisfied Section 306. *See* Pet. App. at 27a-34a, 35a-39a.

change those decisions may be. This expansion of the court of appeals' conception of its jurisdiction to review administrative decisions constitutes a radical and dangerous break with precedent and deserves review by this Court. *See* Pet. at 22-28; Fed. Br. at 6-7 & n.2.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, petitioner respectfully requests that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

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